No. 89-688

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al*,.
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In 1987, the Interstate Commerce Commission ("ICC" or "Commission") reversed its 40-year-old policy regarding the movement of empty rail cars for repair. The Commission concluded, for the first time, that rail carriers could charge separately for these moves. The Commission's conclusion undermines a central tenet of rail regulation—that rail carriers are responsible for providing suitable rail cars for transportation—and conflicts with decisions from the Seventh Circuit construing the Interstate Commerce Act. The Commission reached its decision after extensive comment by members of the industry, comments the Commission requested pursuant to the rule making procedures of the Administrative Procedure Act. Despite the well-established doctrine that agency rule making applies prospectively only, the Commission proceeded to apply this new rule retroactively to the petitioners in the case below. The questions presented are:

1. May the lower court require a showing of congressional awareness and express congressional approval before it recognizes the significance of Congress' failure to disturb the ICC's longstanding rule on empty repair moves, despite this Court's opinions stating that proof of congressional awareness or approval is not required?

2. Which interpretation of the Interstate Commerce Act is correct: the interpretation approved by the court below which upheld the ICC's new empty repair move policy, or the interpretation of the Seventh Circuit which held that separate charges for empty repair moves violated the Act?

3. May the lower court allow the Interstate Commerce Commission to alter the historic common carrier obligations of railroads to bear the cost of furnish-

ing the cars in which they transport property when Congress has not indicated an intent to alter these obligations?

4. May the lower court permit the ICC to apply its new rule on empty repair moves retroactively?

LIST OF PARTIES

Petitioners in consolidated case Nos. 87-1125, 87-1171 and 88-1284 include Railway Progress Institute Committee on Tank Cars, General American Transportation Corporation, General Electric Railcar Services Corporation, and Union Tank Car Company.

Intervenors in support of petitioners in these consolidated cases include the Chemical Manufacturers Association, LO Shippers Action Committee, MFB Industries, Inc., and U.S. Clay Producers Traffic Association, Inc.

Respondents in these consolidated cases include the Interstate Commerce Commission and the United States of America.

Intervenors in support of respondents in these consolidated cases include the Association of American Railroads, the Baltimore and Ohio Chicago Terminal Railroad Company, and Indiana Harbor Belt Railroad Company.

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Petitioners General American Transportation Corporation, General Electric Railcar Services Corporation, Railway Progress Institute Committee on Tank Cars, Union Tank Car Company, Chemical Manufacturers Association, MBF Industries, Inc., LO Shippers Action Committee, and U.S. Clay Producers Traffic Association, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceedings on April 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 872 F.2d 1048 and is reprinted in the appendix hereto ("App.") at 1a. The opinion on rehearing is reported at 883 F.2d 1029 and is reprinted at App. 30a.

The decision of the Interstate Commerce Commission reversing its no-charge-for-empty-repair-moves policy is reported at 3 I.C.C.2d 599 and is reprinted at App. 37a. The decision of the Interstate Commerce Commission denying the petition for reopening and reconsideration is not reported and is reprinted at App. 69a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1989, App. 1a, and a timely petition for rehearing and suggestion of rehearing en banc was denied on June 30, 1989. App. 30a. On September 13, 1989, the Chief Justice extended the time within which to petition for certiorari to and including October 28, 1989. App. 101a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The following provisions of the Administrative Procedure Act are at issue:

> 5 U.S.C. § 551. Definitions.
>
> For the purposes of this subchapter—
>
> • • • •
>
> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
>
> (5) "rule making" means agency process for formulating, amending, or repealing a rule;
>
> • • • •

(7) "adjudication" means agency process for the formulation of an order * * *.

5 U.S.C. § 553. Rule making

* * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. * * *.

The following provisions of the Interstate Commerce Act, as amended, are at issue:

49 U.S.C. § 10102. Definitions.

In this subtitle—

* * * *

(26) "transportation" includes

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10728. Separate rates for distinct rail services.

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of Chapter 105 of this title may, on its own initiative or at the request of a shipper or receiver of property, establish separate rates for distinct rail services to—

(1) encourage competition;

(2) promote increased reinvestment by rail carriers; and

(3) encourage and make easier increased nonrailroad investment in the production of rail services.

(b) The Commission shall maintain expeditious procedures to permit separate rates for distinct rail services to—

(1) encourage those services to be priced in accordance with the cash-outlay incurred by the carrier and the demand for them; and

(2) enable shippers and receivers to evaluate transportation and related rates and alternatives.

49 U.S.C. § 10761. Transportation prohibited without tariff.

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. * * *.

49 U.S.C. § 11122. Compensation and practice.

(a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

STATEMENT OF THE CASE

The agency rule at issue in this case concerns whether railroads can charge the owners of private railcars for the costs of transporting their empty cars to and from repair facilities for maintenance. It is undisputed that

part of the obligation of railroads as common carriers is to provide railcars suitable for the transportation of a broad range of products. App. 4a. When the railroads are incapable of providing suitable equipment or refuse to invest in necessary equipment—such as tank cars—they are required to compensate shippers who do provide it. As the court below recognized, it is a given that the "[r]ailroads are not permitted to charge the railcar owners or car providers separately to return an empty car to the point of origination." *Id.* Instead, such empty moves have been regarded as a necessary part of the railroads' use of the cars to fulfill *their* common-carrier obligations, and thus the cost for them can only be recovered by the railroads in freight rates for commodities loaded and transported in such cars. *Id.*

Until the ICC action challenged here, empty movements of the private cars to and from repair facilities for ordinary maintenance were historically treated in the same manner as other empty movements. *See Union Tank Car Co.*, 268 I.C.C. 338 (1947). This rule was challenged in a 1977 proceeding involving many of the same parties involved in the present case. The ICC turned away the challenge, reiterating its adherence to the rule that railroads could not charge separately for empty car repair moves. *General Am. Transp. Corp.* v. *Indiana Harbor Belt R.R. Co.*, 357 I.C.C. 102 (1977). In that proceeding, the Commission confirmed that once the private cars were put into service they were "instrumentalities of transportation" whose movement for repairs was the collective responsibility of the carriers, rather than a "distinct rail service" provided the individual car owners for which those owners could be separately charged. *Id.* The ICC ruled that because "[t]he need for such repairs of privately owned cars will usually arise as a result of use by many different carriers over a considerable period of time. * * * [T]he costs of repair movements of privately owned cars must be treated as a common cost

which must be shared by all carriers which derive revenue from the national private-car fleet." *Id.* at 127.

The ICC noted that the costs of empty car repair moves could be recouped through the charges for carrying freight in the cars. While this might mean that some carriers would end up with more than their proportional share of the costs of empty car repair moves, the Commission recognized that railroads and private tank car owners had agreed to an "equalization rule" discouraging excessive empty mileage. The Seventh Circuit affirmed the ICC ruling as the "correct conclusion," holding that the imposition of separate charges for empty car repair movements would violate the Interstate Commerce Act. *Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, 577 F.2d 394, 400-401 (7th Cir. 1978).

Nonetheless, in 1983, the same railroad involved in the 1977 proceeding (along with another) filed proposed tariffs seeking to impose separate charges for empty car repair moves. Petitioners initiated an adjudicatory proceeding before the ICC to block the tariffs. Mid-way through the adjudication process the ICC published a notice in the Federal Register under the authority of the "rule making" provision of the Administrative Procedure Act, 5 U.S.C. § 553, "advising the public and the parties * * * that we may modify or reverse our prior decisions," and soliciting comments from interested persons. 49 Fed. Reg. 39,740 (Oct. 10, 1984). It followed up with another notice seeking additional comments, again citing the authority of the rule making provision of the APA. 50 Fed. Reg. 10,867-68 (March 18, 1985). Three years later the Commission reversed its 40-year-old policy, announcing that railroads could charge private car owners for empty repair moves.

Relying on the public comments it had received as a result of its invocation of the APA rule making proceedings, the ICC decided that its 40 year-old rule was an

inefficient and inequitable means of compensating carriers for empty car repair moves. App. 44a-48a. The Commission reasoned that the system of recouping the costs through freight charges resulted in some carriers bearing more than their fair share of repair move costs. It viewed such a result as contrary to "Congressional direction" in the 4R Act [1] and the Staggers Act [2] requiring "the Commission to encourage efficient pricing and provide all carriers with a realistic opportunity to earn adequate revenues." App. 56a. Finally, the ICC applied the new rule retroactively to the charges proposed in the 1983 tariffs, rejecting petitioners' contention that such an about-face—announced as a result of rule making procedures—could only be applied prospectively. App. 65a-66a. Vice Chairman Lamboley dissented. App. 68a.

On April 14, 1989, the Court of Appeals upheld the Commission's action. The court below held that the agency's prior policy had not been legislatively ratified, despite Congress' failure to overturn it when revisiting the pertinent statute in 1978 and 1980. The Court then held that the agency's "reinterpretation" was reasonable, not because new statutory provisions compelled the new policy, App. 15a, and not because of any specific congressional intent on the issue, App. 14a, but rather because "the Commission permissibly discerned an *emerging* congressional purpose to permit carriers to price their services efficiently in accordance with both the costs properly chargeable to such services and market forces." *Id.* (emphasis added).

Finally, the lower court upheld retroactive application of this new regulatory regime. It held that the adjudi-

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[1] Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4R Act was in effect in 1977 when the Commission reaffirmed its rule banning separate charges for empty car repair moves in the first *Indiana Harbor* proceeding. *See* 357 I.C.C. at 129 n.30, 131 n.31.

[2] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

catory proceeding had not been transformed into a rule making requiring prospective application only, despite the ICC's own express invocation of the APA rule making provisions. According to the Court of Appeals, the agency's formal solicitation of and reliance on public comments under the APA was no different than judicial consideration of *amicus* briefs. App. 25a.

Petitioners sought rehearing, which was denied on June 30, 1989. App. 31a. Judge Silberman—the author of the panel opinion—issued an additional opinion concurring in the denial of rehearing. He recognized, quoting from a recent Supreme Court concurring opinion by Justice Scalia, that "arguments no doubt can be advanced in support of limiting agencies' policymaking use of the adjudicatory form to circumstances where 'legal consequences hinge upon the interpretation of statutory requirements, and where no pre-existing interpretive rule construing those requirements is in effect,' [*Bowen* v.] *Georgetown Univ. Hosp.*, 109 S. Ct. at 480 (Scalia, J., concurring)," but he concluded that "the law of this circuit is emphatically to the contrary." App. 34a.

REASONS FOR GRANTING THE WRIT

The court below erred in upholding the ICC's reversal of its 40-year-old rule prohibiting railroads from imposing separate charges on car owners for empty repair moves. The decision below merits review by this Court for four separate reasons. First, the ruling below conflicts with holdings of the Seventh Circuit that the Interstate Commerce Act forbids such charges. *See Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, *supra*; *Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, 611 F.2d 1184, 1188 (7th Cir. 1979); *Evans Prods. Co.* v. *ICC*, 729 F.2d 1107, 1109 (7th Cir. 1984). Resolution of this conflict is of critical importance to the rail and private railcar industries.

Second, the approach of the court below is contrary to this Court's oft-repeated admonition that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986), *quoting NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The court below rejected petitioners' reliance on this doctrine, insisting upon express evidence that Congress was aware of and had approved the ICC's longstanding rule. The Circuits are in considerable disarray with respect to the standards for applying this doctrine, and this Court should grant the writ to resolve the confusion.

Third, the holding below undermines a central tenet of rail regulation—that railroads must bear the costs of providing suitable railcars as part of their common carrier obligation. Such a marked departure from a basic principle historically governing regulation of an important national industry should not be permitted to stand without review by this Court.

Finally, this Court should grant review to resolve the conflict created by the lower court's decision to permit retroactive application of the ICC's new rule. The decision below blurred the " 'dichotomy between rule making and adjudication' "—the dichotomy upon which " 'the entire [Administrative Procedure] Act is based.' " [3]—and permitted retroactive application even though the ICC invoked and relied upon the APA's prospective rule making provisions. Judge Silberman, in his opinion on rehearing, expressly recognized that the law of his Circuit was "emphatically * * * contrary" to Justice Scalia's

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[3] *Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 477 (1988) (Scalia, J., concurring), *quoting* Attorney General's Manual on the Administrative Procedure Act (1947) at 13-14.

reasoning last Term in his concurring opinion in *Bowen*. App. 34a. Judge Silberman also cited conflicting authority from the Ninth Circuit. *Id.* This Court should grant the writ to resolve the conflict and determine whether the arguments raised by Justice Scalia in his concurring opinion or the "contrary" view of the court below should prevail.

I. The Court Below Erred In Dismissing The Significance Of Congress' Failure To Disturb The ICC's Longstanding Rule

When the Commission ruled more than 40 years ago that railroads could not impose separate charges for empty repair moves, its decision was based on a reading of the Interstate Commerce Act. The Commission concluded that during such movements the cars were "instrument[alities] of transportation" and not "property subject to transportation charges within the meaning of section 6(7) of the act." *Union Tank Car Co.*, 268 I.C.C. 338, 342 (1947). When the ICC reaffirmed this rule 30 years later, its decision was once again based on a construction of the statute. In addition to quoting from its *Union Tank Car* analysis, the Commission further ruled that empty repair moves were not "distinct rail services" under 49 U.S.C. § 10728 for which separate rates could be charged. *General Am. Transp. Corp.* v. *Indiana Harbor Belt R.R. Co.*, 357 I.C.C. 102, 129 (1977) On appeal, the Seventh Circuit agreed that the railroads' effort to assess such charges in that case was a violation of the Interstate Commerce Act. *Indiana Harbor Belt R.R. Co.* v. *General Amer. Transp. Corp.*, 577 F.2d at 400.

Congress extensively amended the Interstate Commerce Act in 1980 with passage of the Staggers Act.[4] Yet Con-

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[4] Pub. L. No. 96-448, 94 Stat. 1895 (1980). *See Coal Exporters Ass'n of the United States, Inc.* v. *United States*, 745 F.2d 76, 80 (D.C. Cir. 1984) ("[t]he Staggers Rail Act of 1980 was a complex and comprehensive amendment to the [Interstate Commerce Act]").

gress did not make any pertinent changes to the provisions on which the ICC had relied in concluding in 1947 and again in 1977 that empty repair moves were not subject to separate charges, nor to the provisions on which the Seventh Circuit had relied in upholding the ICC's interpretation of the Act as the "correct conclusion." 577 F.2d at 401.

Again this background of congressional and judicial acceptance of the ICC's established rule, a reversal of the rule could be justified only by persuasive evidence that *Congress* had changed its mind. The ICC pointed to no such evidence, and the court below acknowledged that the agency cited no new legislative provisions "reflective of Congress' specific intent on the question." App. 14a. As the court stated, the provisions on which the ICC relied "do not *compel* the approach adopted by the Commission in *Indiana Harbor II*. None of the provisions is specifically directed to relations between carriers and car providers." App. 15a (emphasis in original). The most that the Court of Appeals could say was that the agency "permissibly discerned an emerging congressional purpose" supporting its action. App. 14a.

Such an inchoate basis may be sufficient to support an agency interpretation with respect to an issue of first impression, or perhaps even a change in an agency interpretation promulgated through rulemaking procedures and accordingly given prospective effect only. When Congress has revisited the pertinent statute and not altered a significant, 40-year rule promulgated under the statute, however, and when that rule is based on a core principle of common carrier obligation that Congress has not disturbed, the agency should not be permitted to change course on such an amorphous basis.

The court below rejected petitioners' argument that this history demonstrated congresional acquiescence in and approval of the longstanding administrative rule, holding that "the legislative reenactment doctrine re-

quires a showing of both congressional awareness and 'express congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated.' " App. 10a, *quoting AFL-CIO* v. *Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987).

This Court's decisions and those of other Circuits, in contrast, are based on the rule that "Congress is *presumed* to be aware" of such a longstanding administrative interpretation, *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (emphasis added), and that such interpretations "are *deemed* to have been approved by Congress" when, as here, the pertinent statute is reenacted without change. *Ward* v. *Commissioner*, 784 F.2d 1424, 1430 (9th Cir. 1986) (emphasis added).

The court below itself acknowledged the conflict. After reiterating its rule that the doctrine "requires" express evidence of congressional awareness and approval, the court recognized in footnote that "[t]he Supreme Court has said, *even absent proof of congressional awareness or approval*, that 'when Congress revisited a statute giving rise to a longstanding administrative interpretation without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." ' " [5]

This Court has not insisted upon express evidence that Congress was actually aware of the administrative interpretation held to have been ratified by reenactment. "It is always appropriate to *assume* that our elected representatives, like other citizens, know the law," *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) (emphasis added), and this Court has stated that " 'Congress is presumed to be aware of an administrative or

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[5] App. 10a, n.10, *quoting Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. at 846, *quoting NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 274-275 (emphasis added).

judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Merrill Lynch, Pierce, Fenner & Smith* v. *Curan*, 456 U.S. 353, 382 n.66 (1982), *quoting Lorillard* v. *Pons*, 434 U.S. at 580-581. This presumption is particularly appropriate when, as here, the administrative interpretation had been in effect for several decades prior to legislative reenactment, had been reaffirmed by the agency on the eve of legislative reenactment, and that reaffirmation had been upheld as statutorily compelled by a Federal Court of Appeals.

Turning to the other prerequisite imposed by the D.C. Circuit, this Court has clearly held that express congressional approval of a longstanding administrative or judicial interpretation is *not* required before applying the legislative reenactment doctrine. On the contrary, "congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy." *Haig* v. *Agee*, 453 U.S. 280, 300 (1981).[6]

The Circuits are in considerable disarray on the question. Some Courts of Appeals appear to agree with the approach of the court below, insisting upon express evidence of legislative awareness and approval. *See, e.g., Horner* v. *Jeffrey*, 823 F.2d 1521, 1531 (Fed. Cir. 1987) ("Congress cannot be held to have approved or even been aware of the [interpretation] when it reenacted the provisions"); *American Trucking Ass'ns, Inc.* v. *ICC*, 722 F.2d 1243, 1249 n.3 (5th Cir. 1984); *Mayburg* v. *Secretary of HHS*, 740 F.2d 100, 104-105 (1st Cir. 1984).

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[6] *See Young* v. *Community Nutrition Inst.*, 476 U.S. 974 (1986); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982); *United States* v. *Rutherford*, 442 U.S. 544 (1979); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965); *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 313 (1933); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

Other Circuits take an opposite approach, applying this Court's precedents establishing that Congress is *presumed* to be aware of longstanding interpretations and *deemed* to approve them when it reenacts the underlying statute without change. *See, e.g., Sierra Club* v. *Hodel*, 848 F.2d 1068, 1080 (10th Cir. 1988) ("[e]specially when an agency has followed a notorious, consistent, and long-standing interpretation, it may be presumed that Congress' silence denotes acquiescence"); *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 501 n.11 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 772 (1988) ("Congress' failure to alter this interpretation while amending the statute in other respects indicates that legislative intent has been correctly discerned"); *Demarest* v. *Manspeaker*, 1989 U.S. App. LEXIS 13193 (10th Cir. Sept. 5, 1989) ("[h]ad Congress meant to change the existing judicial and administrative interpretation of [the statute], it surely could have done so in more express terms"); *In re Dept. of Energy Stripper Well Exemption Litig.*, 690 F.2d 1375, 1388 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 1127 (1983) (congressional failure to modify viewed as "a significant and probative indication" of approval; reenactment without change equated to Congress speaking "loudly, clearly and unequivocally" in favor of administrative interpretation).

This confusion is also evidenced in intra-circuit conflicts. *Compare, e.g., Fmali Herb, Inc.* v. *Heckler*, 715 F.2d 1385, 1387-88 n.1 (9th Cir. 1983) ("[t]he regulation has never been the focus of active debate of judicial decisions, so deference based upon congressional acquiescence is inappropriate") *with Osborn* v. *American Ass'n of Retired Persons*, 660 F.2d 740, 746 (9th Cir. 1981) ("[t]he agency's interpretation of the statute is entitled to still more deference when Congress subsequently reenacts the statute without significant change, for it is then presumed that the agency interpretation has been implementing the statutory objectives to Congress' satisfaction").

A proper understanding of the content of the legislative reenactment doctrine is of central importance throughout the area of administrative law. The articulation of the court below—requiring express evidence of awareness and approval—conflicts with this Court's explanation of the doctrine and the approach of several Circuits. This Court should grant the writ to clarify the scope of the doctrine and provide guidelines for its uniform application in the Circuits.

II. The Decision Below Conflicts With Decisions From The Seventh Circuit

The decision below conflicts with decisions from the Seventh Circuit holding that empty repair movements of private railcars "are not distinct rail services for which a direct charge may be made." *Evans Prods. Co.* v. *ICC*, 729 F.2d at 1109. *Accord Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, *supra*; *Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, *supra*. The court below acknowledged that "the Seventh Circuit twice approved the Commission's former position that empty-repair moves were not distinct rail services," but dismissed the significance of these rulings on the ground that they did not "rest[] on a construction of the Interstate Commerce Act" and did not preclude the ICC from changing course. App. 9a. The court's reasoning is unfounded and does not mitigate the conflict between the Circuits.

A reading of the Seventh Circuit's opinion in *Indiana Harbor Belt I* rather clearly discloses that its decision upholding the ICC's prior rule *was* based on a construction of the Interstate Commerce Act. The Seventh Circuit expressly and unambiguously held that the railroad's imposition of charges on car owners for empty car repair moves "is an obvious and direct violation of Section 1(5) of the Interstate Commerce Act," "violates Section 1(6)," and "also violates Section 1(11) of the Act." 577 F.2d at 400. After noting that "[c]ar service is defined in Sec-

tion 1(10) to include the 'use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property,'" the Seventh Circuit concluded that "[c]learly, the imposition of a switching charge on a movement of cars which is a part of the transportation service comprehended by the charge on loaded movements is an unreasonable and unlawful car service practice." *Id.* The assertion of the court below that the Seventh Circuit did not construe the Interstate Commerce Act is amply refuted by the language of the Seventh Circuit's opinion. The Seventh Circuit did not hold simply that the ICC's prior rule was a permissible construction of the statute; it was the "correct conclusion" based on the statute itself. 577 F.2d at 401.

The Seventh Circuit's later decisions relying upon *Indiana Harbor I* cited the statutory terms of art in explaining the holding of *Indiana Harbor I*. In *Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, 611 F.2d at 1188, the court noted that private cars, "albeit 'property' in the ordinary sense of that term, are 'instrumentalities of transportation' and therefore not subject to ordinary freight charges." In *Evans Products*, 729 F.2d at 1109, the court stated that "[r]ail cars that have entered the national fleet and are in use shipping goods generally are considered instrumentalities of transportation for which no freight charges for their movement may be imposed" and that "[r]epair switches are not distinct rail services for which a direct charge may be made." "Instrumentality * * * related to the movement of * * * property" and "distinct rail services" are of course statutory phrases, *see* 49 U.S.C. §§ 10102(26), 10728, and the Seventh Circuit decisions—contrary to the view of the court below—construed the meaning of those statutory phrases.

The decision below thus conflicts with the Seventh Circuit decisions on whether the Interstate Commerce Act permits railroads to impose separate charges for empty

private car repair moves. This Court should grant the writ to resolve this conflict.

III. The ICC's New Rule Undermines A Central Tenet Of Rail Regulation That Congress Has Not Rejected

The court below upheld the Commission's about-face because of the policies it discerned in the Staggers Act of promoting an efficient railroad rate structure and preventing cross-subsidization. *See* App. 14a-15a. The court noted the ICC's concern that some railroads bore more than their fair share of empty repair move costs, because they had a large number of empty repair moves—for which they could not charge separately—relative to freight movements in the cars, through which they could attempt to recover the empty repair move costs. But the ICC's new rule does not promote the policies of the Staggers Act by correcting any possible misallocation of empty repair move costs *among* railroads. Rather, it arbitrarily and capriciously shifts the costs of such moves away from *all* railroads and onto the car providers.

Nothing in the Staggers Act, however, suggested altering the historic common carrier obligations of the railroads, including "the fundamental common carrier obligations to furnish suitable equipment for the transportation of all traffic handled by [the railroad] and to maintain such equipment in proper condition for transportation use." *Indiana Harbor Belt R.R. Co.* v. *General Am. Transp. Corp.*, 577 F.2d at 399. As the Seventh Circuit noted in its *Evans Products* decision—issued several years after passage of the Staggers Act—"[r]ailroad common carriers are required to offer shippers complete transportation services; as part of these services, carriers must provide shippers with the cars in which freight is moved." 729 F.2d at 1108. *See also Atchison, T. & S. F. Ry. Co.* v. *Union Tank Car Co.*, 611 F.2d at 1188 ("the duty to furnish cars is the railroads', not the shippers'. Thus when railroads use cars other than their

own to transport property or passengers, the cars are being used for the revenue purposes of the railroads and not for the private benefit of the owner").

The Commission's new rule is arbitrary and capricious because it addresses purported concerns about cross-subsidization and misallocation of empty repair move costs among *railroads* by shifting those costs away from the railroads altogether and onto private car *providers*. Under historic common carrier doctrine, it is the railroads—and not the car owners—who must bear the full cost of owning and maintaining the cars. *See* 49 U.S.C. § 11121(a)(1).

Both the ICC and the Court of Appeals professed continued adherence to the principle of carrier responsibility for the costs of owning railroad cars. App. 4a, 38a. The new rule, however, permits carriers to evade that historic responsibility. Indeed, the court below recognized that the Commission

> may have been a bit facile in its initial opinion in suggesting that its decision involved only an accounting change that would have little or no impact in determining who—as between carriers and car providers—would bear the burden of the costs involved. In its order on rehearing, however, the Commission conceded that car providers may be unable to recoup completely the costs of empty-repair moves from railroads * * *. And the Commission reiterated, in any event, that the statute simply does not guarantee providers full cost recovery. [App. 17a.]

Under the new rule, railroads can charge providers for empty repair moves—concededly a component of the common carrier obligation—and the car providers are to attempt to recoup those costs through adjustments in allowances the providers receive from the carriers for furnishing the cars. This new regime will not result in "full cost recovery" by the car providers for several reasons:

- Carriers in recent years have been unwilling to update private car allowances to reflect increased costs of ownership.
- Some carriers have imposed arbitrary "caps" on mileage allowances to car providers.
- Many car providers furnish cars under long-term contracts, with rates set under the prior regulatory regime that did not allow empty repair move charges.

In the absence of full cost recovery, however, the car providers—not the carriers—will bear at least part of the cost of the common carrier obligation to furnish suitable railcars. Nothing in the Staggers Act suggested rationalizing rail rates by shifting common carrier obligations from the common carriers, individually or collectively. If Congress had intended the Act to accomplish such a significant change, it is reasonable to expect that it would have mentioned it in the text of the statute or the voluminous legislative history. It did not do so. This failure is particularly telling given the longstanding administrative adherence to and judicial approval of the established rule.

Neither the agency nor the court below could point to any specific congressional intent supporting reversal of the empty repair move rule. The ICC and D.C. Circuit instead relied upon a patchwork of hints in the Staggers Act pointing to "an emerging congressional purpose." App. 14a. As this Court noted recently, however, the " 'deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983), *quoting American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

There is no evidence in the Staggers Act that Congress made the policy decision to alter the historic common carrier obligations of railroads to bear the cost of furnishing the cars in which they transport property. In fact, Congress left undisturbed the longstanding rule implementing this obligation. Against this background, it was arbitrary and capricious for the ICC to change the rule and embrace a new policy. The question merits review by this Court because the court below has misinterpreted an important federal statute and erroneously ascribed to Congress an intent to undermine a basic principle of common carrier obligation.

IV. The Court Below Erred In Permitting The Agency To Apply Its Reversal Of Policy Retroactively

What is particularly troubling is the decision of the court below that the ICC could apply its new rule retroactively to petitioners, who had relied on the old established rule in shaping their business relationships with the intervenor railroads. This decision conflicts with decisions from other Circuits on the retroactive application of new agency interpretations, and with the recent decision of this Court in *Bowen* v. *Georgetown University Hospital*, 109 S. Ct. 468 (1988). The opinion for the Court and Justice Scalia's concurring opinion in *Bowen*—issued after briefing was complete in the present case—are highly pertinent to the retroactivity issue, but were not cited and apparently not considered by the panel in its initial decision. In his supplemental opinion on rehearing, Judge Silberman—author of the panel opinion—expressly noted that the views expressed in Justice Scalia's opinion were contrary to the law applied by the Court of Appeals for the District of Columbia Circuit. App. 34a.

The error of the court below derived from the hermaphroditic nature of these proceedings. It is well established that agency adjudication applies retroactively,

and agency rule making applies prospectively only. This makes sense because, as Justice Scalia explained in his concurring opinion in *Bowen*, "[a]djudication *deals* with what the law was; rulemaking deals with what the law will be." 109 S. Ct. at 478 (emphasis in original). In this case, the ICC converted what began as an adjudication to *apply* its pre-existing rule into a rule making proceeding to *change* that rule. The Commission nonetheless reverted to viewing the proceeding as an adjudication in applying its new rule retroactively to petitioners, even though the new rule admittedly did not reflect what the law had been.

The Commission's decision to overturn its established policy on the permissibility of separate charges for empty car repair moves was agency rule making. The results of such rule making may be applied prospectively only.[7] The ICC itself stayed the normal course of what began as an adjudicatory proceeding and issued a notice in the Federal Register soliciting public comments on the desirability of changing its established policy. When it did so, the agency expressly invoked and relied upon Section 553 of the APA, entitled "Rule making." 5 U.S.C. § 553 (1982). Over petitioners' objections, it transformed the proceeding from one "designed to adjudicate disputed facts in *particular* cases"[8] into a broader undertaking to consider "what the law will be." *Bowen*, 109 S. Ct. at 478 (Scalia, J., concurring).

The transformation of the proceeding was not simply a matter of form but of substance as well. The ICC's requests for comments under the APA rule making provisions generated responses concerning industry practices

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[7] *See Bowen*, 109 S. Ct. at 471; *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

[8] *Association of Nat'l Advertisers* v. *FCC*, 627 F.2d 1151, 1165 (D.C. Cir. 1979) (emphasis added), *cert. denied*, 447 U.S. 921 (1980).

and policies from over 20 car providers, shippers, railroads, trade associations, and other organizations in addition to the parties initially before the agency. *See* App. 43a, n.10-12. The agency expressly relied upon legislative facts it discerned on the basis of these filings in concluding that there was an industry-wide misallocation of empty repair move costs among railroads, and in deciding to overturn its established policy. App. 44a-48a. Such solicitation, consideration, and reliance on legislative facts submitted by representatives of various broad segments of the industry is emblematic of agency rulemaking.[9]

The lower court's sole response to this problem was to note that courts often consider *amicus* briefs in deciding cases. App. 25a. The analogy is misplaced and misleading. Courts are empowered to act *only* in an adjudicatory capacity, and any consideration of *amicus* briefs does not transform the nature of the court's task. Indeed, in judicial proceedings *amicus* briefs cannot be filed as a matter of right, *see, e.g.*, Fed. R. App. P. 29; S. Ct. Rule 36, cannot expand the issues or arguments presented by the parties before the court, *see, e.g., UPS* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981), and need not be considered at all by the court. Agencies, in contrast, can proceed *either* through adjudication *or* rule making. When, as here, an agency invokes the rule making procedures of Section 553 of the APA, any interested member of the public acquires the *right* to submit comments, which *can* expand the contentions and issues raised by the parties, and any relevant comments that are submitted *must* be considered by the agency. *See* 5 U.S.C. § 553(c) (1982).

In upholding the ICC's approach, the court below blurred the "dichotomy between rule making and adjudi-

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[9] *See, e.g., Independent Bankers Ass'n of Ga.* v. *Board of Governors of the Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C. Cir. 1975); *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

cation' "—the dichotomy upon which " 'the entire [Administrative Procedure] Act is based' "—and left petitioners with the worst of both worlds.[10] The Court of Appeals upheld the agency's change in position by treating the case as rule making, in which the agency was striving to "discern[] an emerging congressional purpose." App. 14a. Such an effort would not pass muster in an adjudication, concerned with "what the law was." *Bowen*, 109 S. Ct. at 478 (Scalia, J., concurring). Once it upheld the new rule, however, the Court shifted gears and treated the case as an adjudication, thereby upholding retroactive application of the new agency interpretation. This whipsawing of petitioners between rule making and adjudication raises fundamental issues of recurring significance to administrative law, issues which this Court should grant certiorari to consider.

As Judge Silberman intimated on rehearing, the decision below conflicts not only with Justice Scalia's opinion in *Bowen*, but also with the Ninth Circuit's decision in *Ford Motor Co.* v. *FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). *See* App. 34a. In *Ford Motor* the Ninth Circuit ruled that the FTC could not proceed through adjudication to change existing law in a manner that had widespread applicability, but must use rule making. *See also Patel* v. *INS*, 638 F.2d 1199 (9th Cir. 1980). The court specifically noted that a pending rule making addressed the same problem as the FTC's adjudicator proceeding. 673 F.2d at 1010. The pertinent facts are indistinguishable here: there is no question that the ICC's decision changed the law, or that the decision will apply generally throughout the industry. And here the ICC invoked the APA rule making provi-

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[10] *Bowen*, 109 S. Ct. at 477 (Scalia, J., concurring) *quoting* Attorney General's Manual on the Administrative Procedure Act (1947) at 13-14. The Supreme Court has "repeatedly given great weight" to the Manual in construing the APA. *See Bowen*, 109 S. Ct. at 476 (Scalia, J., concurring) (citing cases).

sions not in another pending proceeding but *in this very proceeding*. Under the Ninth Circuit's *Ford Motor* ruling, the ICC's change in the law could only be effected through rule making, and thus could not be retroactively applied. This Court should grant the writ to resolve this basic conflict on an important and recurring issue of administrative law.

The approach of the court below is also in sharp contrast to that of the Fifth Circuit in *Nueces County Navigation Dist. No. 1* v. *ICC*, 674 F.2d 1055 (5th Cir.), *cert. denied*, 459 U.S. 1035 (1982). In that case the Court of Appeals upheld the ICC's conversion of an adjudicatory proceeding into a rule making, but only after stressing that "no retroactive liability was imposed" as a result of the hybrid proceeding and that "the only effect of the adoption of the new standard * * * is to permit unequalized rates *in the future*. * * *." *Id.* at 1066 (emphasis added). That plainly is not the case here; the retroactive application of the ICC's new rule yields charges in excess of $3 million in this case.[11]

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[11] *See* Ct. App. Br. for Pets. at 14 n.16.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 1989 Decided April 14, 1989

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE,
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO.,
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.,
ASSOCIATION OF AMERICAN RAILROADS,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors

No. 87-1171

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS,
BALTIMORE AND OHIO CHICAGO TERMINAL
RAILROAD CO., *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
MBF INDUSTRIES, INC.,
Intervenors

No. 88-1284

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO., *et al.*,
Intervenors

Petitions for Review of Orders of the Interstate Commerce Commission

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Patrick M. Raher, with whom *Elizabeth B. Heffernan*, *Thomas F. McFarland, Jr.*, *David F. Zoll*, *John L. Oberdorfer*, *Scott N. Stone*, *Peter A. Greene*, *R. Hale Foote* and *Henry M. Wick, Jr.*, were on the joint brief, for petitioners and intervenors Chemical Manufacturers Association, MBF Industries, Inc., and U.S. Clay Producers Traffic Association, Inc. in 87-1125, 87-1171 and 88-1284.

Peter F. Rousselot also entered an appearance for petitioners in 87-1171.

Dennis J. Starks, Attorney, Interstate Commerce Commission, with whom *Henri F. Rush*, Deputy General Counsel, *Robert S. Burk*, General Counsel, *John J. Powers, III* and *John P. Fonte*, Attorneys, Department of Justice, were on the brief, for respondents in 87-1125, 87-1171 and 88-1284.

Stephen C. Herman, with whom *Harold E. Spencer* was on the brief, for intervenor LO Shippers Action Committee in 87-1125, 87-1171 and 88-1284.

Robert M. Jenkins, III, with whom *Paul A. Cunningham, Marc D. Machlin, W. Susanne Addy, Joseph D. Anthofer, James L. Howe, III, John B. Norton, William R. Power, Charles C. Rettberg, Alice C. Saylor, James C. Schultz, John MacDonald Smith, J. Thomas Tidd* and *Dennis W. Wilson*, were on the brief, for intervenor Association of American Railroads in 87-1125, 87-1171 and 88-1284.

Anna M. Kelly, Emried D. Cole, Jr., and *Paul R. Hitchcock* filed a joint brief for intervenors The Indiana Harbor Belt Railroad Co. and the Baltimore and Ohio Chicago Terminal Railroad Co. in 87-1125, 87-1171 and 88-1284.

Lawrence M. Cohen and *Shayle P. Fox* filed a brief for *amicus curiae* Rescar, Inc. urging that the petitions be granted.

William Henry Barrett also entered an appearance for *amicus curiae* Rescar, Inc.

Before: SILBERMAN, WILLIAMS and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: In these consolidated cases, petitioners [1] request review of the Interstate Commerce Commission's reversal of a forty-year old policy that substantially prevented railroads from charging the owners of private railcars for the costs of transporting their cars (when empty) to repair depots for ordinary main-

[1] We use the term "petitioner" to refer collectively to petitioners General American Transportation Corporation, General Electric Railcar Services Corporation, Union Tank Car Company, and intervenors in support of petitioners Chemical Manufacturers Association, MBF Industries, Inc., U.S. Clay Producers Traffic Association, and LO Shippers Action Committee ("LOSAC").

tenance. We hold that the Commission's reinterpretation of the statute is permissible and rationally explained, and further conclude that it was within the Commission's discretion to apply its new policy retroactively to the parties before it in this adjudication. Accordingly, we deny the petitions in all respects.

I.

Railroads, pursuant to their common-carrier obligations under the Interstate Commerce Act, must provide railcars suitable for the transportation of a broad range of property, including agricultural products, flammable liquids, as well as crated freight. In part because of these diverse requirements, it has proved impracticable for rail common-carriers to invest the capital necessary for the acquisition of general-use and specialty rolling stock. Carriers, therefore, commonly lease railcars both from firms in the business of supplying railcars and, occasionally, from shippers themselves. Under these leasing arrangements, railroads fulfill their common-carrier obligation to make available suitable railcars by paying car providers their costs of owning the rolling stock through a variety of means, including direct "mileage allowances" and offsets on line-haul freight tariffs.

Railcars "provided" to railcars in this manner accrue a substantial amount of "empty mileage"—mileage traveled without carrying any freight—in part because railcars commonly make a so-called "empty return." Railroads are not permitted to charge the railcar owners or car providers separately to return an empty car to the point of origination; instead, carriers may recover the cost of an empty return only by incorporating it in their rates for the line-haul movement of freight. In addition, railcars are periodically moved empty to repair depots selected by car providers. Up until the challenged order was filed, the Commission treated such empty-repair mileage identically to empty-return mileage by

prohibiting carriers (in most circumstances) from charging car providers separately for empty-repair moves. In a 1977 adjudication involving many of the parties before us today, *see General Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 357 I.C.C. 102 (1977). (*"Indiana Harbor I"*), *aff'd sub nom. Indiana Harbor Belt R.R. Co. v. General Am. Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978), the Commission reaffirmed its then longstanding prohibition on empty-repair-move charges. It held that private railcars moving empty for repair continued to serve as "instrumentalities of transportation" during such movements since repairs enabled railroads to maintain their use of such cars for revenue-generating purposes. Accordingly, the Commission concluded that empty-repair moves were *not* "distinct rail services" for which railroads could impose a separate tariff; rather, such moves were deemed a collective responsibility of those carriers who derive more than *de minimus* economic benefit (through line-haul freight charges) from the use of privately-owned railcars. 357 I.C.C. at 126-27.

Whatever its merits, *Indiana Harbor I*'s regime of collective railroad responsibility for empty-repair moves left certain carriers (predominantly switching or terminating railroads)[2] with an empty-repair mileage burden considerably out of proportion to the economic benefit those carriers derived from the line-haul movement of freight. And cross-subsidization among railroads was not the only perceived evil of *Indiana Harbor I*: the rule was believed to encourage inefficient depot selections because the costs of empty-repair transportation were imposed on parties other than those selecting the repair depot locations. In 1983, the Indiana Harbor Belt Railroad ("IHB") and the Baltimore & Ohio Chicago Terminal Railroad Company ("BOCT"), two carriers that found themselves dis-

[2] "Switching railroads" include short lines that transfer cars between line-haul networks, while "terminating railroads" provide service at either end of a commonly-traversed network.

advantaged by *Indiana Harbor I*, filed proposed tariffs for empty-repair moves in an effort to prompt the Commission to change course. The IHB and the BOCT contended that the statutory basis for the theory of collective responsibility had been undermined by recent congressional enactments designed to give railroads greater flexibility in imposing tariffs for rail services. The proposed tariffs elicited virtually immediate complaints from car providers,[3] and the instant proceeding began.

After an initial dismissal of the complaints by an administrative law judge and a subsequent reversal by the ICC Review Board (holding that *Indiana Harbor I* controlled the case), the complaints were appealed to the full Commission in July 1984. The ICC stayed the Review Board's order and published a notice in the Federal Register indicating that it was considering modifying or reversing *Indiana Harbor I*. *See* 49 Fed. Reg. 39,740 (1984); *see also* 50 Fed. Reg. 10,867 (1985) (soliciting additional comments). The Commission thereafter reopened the record underlying the complaints before it (and in *Indiana Harbor I*) and invited industry comments concerning, among other issues, whether or not the prohibition against empty-repair-move charges was efficient and equitable.

Three years later, after compiling an extensive record, the Commission reversed *Indiana Harbor I* and ruled that carriers may impose tariffs on car providers for empty-repair moves. *See General Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C.2d 599 (1987) ("*Indiana Harbor II*"). The Commission revisited the statutory questions analyzed in *Indiana Harbor I* and concluded that the Interstate Commerce Act, at least after its amendment by the Railroad Revitalization and

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[3] The complainant car providers unsuccessfully sought interim ICC suspension of the proposed tariffs. *See* 49 U.S.C. § 10707 (1982) (providing suspension authority).

Regulatory Reform Act ("the 4R Act")[4] and the Staggers Act[5] does not prohibit carriers from imposing an initial charge on car providers for empty-repair moves. *See Indiana Harbor II* at 606-11. The ICC further explained that permitting carriers to impose initial repair-move-charges would redress the problem of intercarrier misallocation of empty-repair-mileage burdens and improve efficiency in the selection of repair depots by placing empty-repair-transportation costs, in the first instance, on car providers. *See id.* at 613-16. The ultimate responsibility for the costs of owning railcars, including the costs of empty-repair moves, would continue to be transferred to railroads through customary channels—such as mileage allowances. *See id.* at 614. Since the ICC concluded that *Indiana Harbor I*'s prohibition on empty-repair-move charges no longer was viable under the Act, it upheld the empty-repair tariffs in the adjudication before it. *See id.* at 620.

The Commission subsequently denied petitioners' request for reconsideration of its *Indiana Harbor II* ruling, setting the stage for this proceeding. Before us, petitioners argue that *Indiana Harbor I*'s prohibition of empty-repair charges is specifically required under the Interstate Commerce Act; that *Indiana Harbor II* rests on an unreasonable construction of the Act and is not supported by a consideration of the legally relevant policy considerations; and that it was unlawful for the Commission to apply *Indiana Harbor II* retroactively to the specific empty-repair tariffs challenged in the underlying adjudication.

II.

We are initially faced with the argument that the Commission's decision fails the first prong of the *Chevron* test that governs federal judicial review of agency statu-

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[4] Pub. L. 94-210, 90 Stat. 31 (1976).

[5] Pub. L. 96-448, 94 Stat. 1895 (1980).

tory interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Commission's decision, we are told, runs counter to a specific legislative intent barring carriers from charging for the empty movement of privately-owned railcars for repair. We think this contention is insubstantial: neither the statutory language nor its legislative history clearly addresses the point at issue.

Petitioners contend that the Act specifically prohibits carriers from assessing charges for the movement of instrumentalities of transportation not carrying property, and that Congress intended railcars moving empty for repair to be treated as instrumentalities. Petitioners cite 49 U.S.C. §§ 10761(a)[6] and 10102(26)[7] to support their argument, but we find their appeal to those sections of the Act misdirected. Taken together or apart, these passages do not address the issue we confront. Section 10761(a), as petitioners recognize, merely imposes a

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[6] Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter.

49 U.S.C. § 10761(a) (1982).

[7] In this subtitle—

* * *

(26) "transportation" includes—

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(26) (1982).

tariff publication requirement on carriers offering transportation or services within the jurisdiction of the Commission, and in no way purports to restrict categorically the types of services for which tariffs may be imposed. And section 10102(26)'s sweeping definition of transportation plainly hurts, rather than helps, petitioners' strained construction.

Petitioners also rely on 49 U.S.C. § 10728, the provision that permits carriers to "establish separate rates for distinct rail services to [] encourage competition[,] promote increased reinvestment by rail carriers [, and] encourage . . . increased non-railroad investment in the production of rail services." 49 U.S.C. § 10728(a) (1982). The best that can be said for this provision, however, is that it begs the question of whether or not an empty-repair move constitutes one such distinct service. To be sure, prior to the Commission's reversal in *Indiana Harbor II*, the Seventh Circuit twice approved the Commission's former position that empty-repair moves were not distinct rail services, *see Indiana Harbor Belt R.R. Co. v. General Am. Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978) (affirming *Indiana Harbor I* on direct review); *see also Evans Prods. Co. v. ICC*, 729 F.2d 1107 (7th Cir. 1984) (sustaining Commission's application of *Indiana Harbor I* to parties before the court), but neither decision rested on a construction of the Interstate Commerce Act, much less a finding of specific congressional intent. Rather, as we read the opinions, the court simply held that the *Indiana Harbor I* policy was not arbitrary and capricious. These prior judicial affirmations of *Indiana Harbor I* do not preclude the Commission from changing course now.

If specific intent is not found in the original legislation, petitioners argue, it was manifested when Congress legislatively ratified *Indiana Harbor I*. We find that contention equally unconvincing. Congress revisited the Interstate Commerce Act on two occasions subsequent to

Indiana Harbor I—in 1978 when it recodified the Act [8] and in 1980 when it approved the Staggers Act.[9] But we see no indication that Congress was either aware of or had approved the Commission's empty-repair-move policy when it recodified the "distinct rail services" provision in 1978 or in 1980 when it amended other portions of the Act. We have held that application of the legislative reenactment doctrine requires a showing of both congressional awareness and "express congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated." *AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987); *see also UAW v. Brock*, 816 F.2d 761, 767 (D.C. Cir. 1987); *Association of American Railroads v. ICC*, 564 F.2d 486, 493 (D.C. Cir. 1977). Petitioners' argument thus is unavailing.[10]

III.

We turn to what we see as the heart of petitioners' case —that the Commission's empty-repair-move policy announced in *Indiana Harbor II* rests on an unreasonable construction of the Interstate Commerce Act. In this sec-

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[8] Pub. L. 95-473, 92 Stat. 1337 (1978).

[9] Pub. L. 96-448, 94 Stat. 1895 (1980).

[10] The Supreme Court has said, even absent proof of congressional awareness or approval, that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). However, whatever its weight, we believe such "evidence" is more relevant to *Chevron*'s second prong. In any event, we think the force of congressional silence is particularly weak in this case given the abundant evidence (which we discuss in Part III) that Congress, in passing the Staggers Act, wanted to put an end to ratemaking practices involving railroad cross-subsidization and other inefficiencies.

tion, we also address petitioners' challenge to the logic and rationality of the *Indiana Harbor II* decision, for we think the questions posed—has the Commission adopted an impermissible construction of the Act and is its empty-repair-move policy arbitrary and capricious—are quite similar.[11] Both questions require us to determine whether the Commission, in effecting a reconciliation of competing statutory aims, has rationally considered the factors deemed relevant by the Act. *See AFL-CIO v. Brock*, 835 F.2d at 917; *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 152 (D.C. Cir. 1984); *cf. NLRB v. United Food & Comm'l Workers Union*, 108 S. Ct. 413, 421 (1987) (stating that courts owe deference to agency interpretation "as long as [] interpretation is rational and consistent with statute").

While *Chevron* commands deference to the Commission's interpretation of the Act which it administers, we must "look to many factors, among them being the 'thoroughness, validity and consistency of . . . [the] agency's reasoning,' " in determining the precise weight to be assigned the Commission's construction in the case before us. *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 164 (D.C. Cir. 1986) (quoting *Democratic Senatorial Campaign Comm. v. Federal Election Comm'n*, 454 U.S. 27, 37 (1981)). Here, of course, we are not asked to review an agency policy at the point of its initial adoption; the order under review represents a reversal of an agency interpretation in force more or less consistently since 1947. *See Union Tank Car Co.*, 268 I.C.C. 338 (1947). But that factor does not mean judicial deference is any less appropriate; indeed, *Chevron* itself involved an agency about-face on a significant question of statutory con-

[11] We do not understand petitioners independently to have challenged the Commission's application of *Indiana Harbor II* to the facts of this case, except inosfar as the Commission's retroactive application of the rule works injustice to the parties to the adjudication, a question we address in Part IV.

struction. *See Chevron*, 467 U.S. at 857-58. Under these circumstances, however, the Commission bears the burden of rationally explaining its departure from its previous interpretation. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983); *see also Natural Resources Defense Council v. EPA*, 725 F.2d 761, 767 (D.C. Cir. 1984). We think the Commission has discharged this responsibility in *Indiana Harbor II*.

A.

The Commission thought it appropriate to reexamine its empty-repair-move policy for two principal reasons. First, it believed the *Indiana Harbor I* rule, under which railroads that participate in some measure in the line-haul carriage of freight were forced to bear collective responsibility for the costs of empty-repair moves, resulted in an inequitable allocation of such costs among the participating carriers, *see Indiana Harbor II*, 3 I.C.C.2d at 604, and in the inefficient placement of empty-repair transportation costs on parties who did not select the repair depot. *See id.* at 611, 616. Integral to its conclusion about unfair intercarrier allocation was the Commission's disenchantment with its so-called "equalization rule" [12] as a means to mitigate cross-subsidization among

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[12] The equalization rule in effect at the time of the decision in *Indiana Harbor II* required car providers whose cars accumulated empty mileage in excess of 106% of loaded revenue mileage to pay a tariff on such excess mileage to a common pool administered by a carrier association. The association, in turn, distributed accumulated revenues to individual carriers in accordance with each carrier's excess empty mileage burden. The 106% figure was designed to account for both empty-return mileage (100% of revenue mileage) and reasonable empty-repair mileage (an additional 6% of revenue mileage).

We note that petitioners' theory—under which all costs of empty-repair moves are presumptively the collective responsibility of carriers—is somewhat inconsistent even with the equalization rule, under which at least a portion of these costs may be borne by car providers if their cars accrue excess non-revenue mileage.

railroads. *See id.* at 605-06. Second, the Commission observed that the legislative environment in which the empty-repair-move rule was announced in *Union Tank* and affirmed in *Indiana Harbor I*—had shifted from acceptance of notions of collective railroad responsibility and cross-subsidization among carriers to congressional disapproval of those same ideas. *See id.* at 607, 610-11. By the time it decided *Indiana Harbor II*, the Commission believed it was acting against a background of congressional desire for greater efficiency in the management of the nation's rail transportation system through increased reliance on market forces.

The record, it seems to us, adequately buttresses these conclusions. Evidence showed that the prior rule, which prohibited empty-repair charges if the carrier derived greater than *de minimus* revenues from the line-haul movement of freight, placed unfair burdens on certain carriers. And despite the expectations it expressed in *Indiana Harbor I*, *see Indiana Harbor I*, 357 I.C.C. at 125, the Commission was presented with abundant indications that the equalization rule was fundamentally ineffective in leveling the differential burdens imposed by its empty-repair charge scheme. Because the rule was designed primarily to address *provider* responsibility for excess non-revenue mileage, and as "there [was] no necessary relationship between each *carrier's* share of repair move responsibility in terms of loaded revenue miles and its participation in repair move operations," use of the equalization accounts could not be expected to prevent railroad cross-subsidization. *Id.* at 606 (emphasis added). The Commission cited the experience of one of the *Indiana Harbor II* carrier-parties to illustrate its point: between 1978 and 1982 the IHB had performed empty-repair switching services which, if charges had been allowed, would have earned the carrier $856,452. Yet the IHB recovered only $96,263 under the equalization rule for the services in question. *See* 3 I.C.C.2d at 604. Per-

mitting carriers to charge for empty-repair moves, the Commission thought, would resolve the intercarrier-allocation problem without doing violence to the principle of carrier responsibility for the costs of owning railroad cars, for car providers could simply combine the costs of empty-repair moves with other costs of ownership in charging the railroads mileage allowances.[13] *Indiana Harbor II* was described by the Commission as, in large measure, a change in the "methods of accounting for the repair cost element of private car owners' expenses." 3 I.C.C.2d at 10.

Recent rail transportation legislation supports the Commission's judgment that Congress intended the Interstate Commerce Act to be administered with an eye toward eliminating inefficient ratemaking practices. The Commission cited various provisions in the 4R and Staggers Acts, not as reflective of Congress' specific intent on the question, but rather as indicative of the tension between *Indiana Harbor I*'s collective-responsibility rationale and general congressional purposes. We think the Commission permissibly discerned an emerging congressional purpose to permit carriers to price their services efficiently in accordance with both the costs properly chargeable to such services and market forces in order to "provide *all* carriers with a realistic opportunity to earn adequate revenues." 3 I.C.C.2d at 611 (emphasis added). The Commission relied on language in sec-

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[13] The Commission concluded as well that allowing carriers initially to impose charges for empty-repair moves would place the costs of such moves on the parties selecting the repair depots —the car providers—and thus promote more efficient depot selections by forcing providers to consider transportation as well as repair costs. *See* 3 I.C.C.2d at 611. Petitioners insist that the 106% equalization rule already encourages car providers to designate the "closest suitable repair shop" by penalizing providers if their cars accrue excess non-revenue miles. The Commission reasonably believed, however, that *Indiana Harbor II* would bring about efficiency gains in repair depot selections vis-a-vis the prior regime by enabling car providers to account more precisely for the transportation costs associated with the choice of a particular repair shop.

tion 101(a) of the Staggers Act stating that "it is the policy of the United States Government [] to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," 49 U.S.C. § 10101a(1) (1982), to "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues," *id.* § 10101a(3), and "to encourage . . . efficient management of railroads and . . . the elimination of noncompensatory rates." *Id.* § 10101a(10). The Commission found further support for this notion in statutory provisions that appear to disapprove of rates that "do not contribute to going concern value" and "encourage[] cross-subsidization." 3 I.C.C.2d at 611; *see* 49 U.S.C. § 10701a(b)(3) ("the Commission shall recognize the policy of this [Act] that rail carriers shall earn adequate revenues"); *id.* § 10701a(c) ("[a]ny rate for transportation . . . that does not contribute to the going concern value of [the] carrier is presumed to be not reasonable"); *id.* § 10704(a)(2) (Commission shall enable carriers to earn adequate revenues); *id.* § 10707a(e)(2) (Commission shall consider the extent to which rates which do not contribute to going concern value can be changed).

Of course, these provisions do not *compel* the approach adopted by the Commission in *Indiana Harbor II*. None of the provisions is specifically directed to relations between carriers and car providers. Taken together, though, the passages support the reasonableness of the Commission's construction of the Act. Congress' objective of an efficient railroad rate structure, and its attendant goal of ensuring that *individual* carriers have the opportunity to earn adequate revenues, at minimum runs counter to *Indiana Harbor I*'s premise of collective responsibility. We think, then, that the Commission has tendered a facially adequate explanation for reversing its course by demonstrating how the factual and legal pred-

icates that underlay *Indiana Harbor I* were either misconceived originally or have since substantially eroded.

Petitioners and intervenor LOSAC nevertheless attack the internal logic and consistency of the Commission's reasoning. LOSAC argues that the premises of the Commission's "accounting change" and "revenue adequacy" explanations of *Indian Harbor II* are fundamentally inconsistent; the former implicitly assumes that as between railroads and car providers generally, *Indiana Harbor II* will be revenue-neutral, while the latter—focused on increased revenues for railroads—explicitly assumes otherwise. LOSAC misapprehends the Commission's justification, however. The ICC's concerns over "revenue adequacy," driven in large part by changes in congressional policy (evidenced in the Staggers Act) had little to do with carriers *generally*, as LOSAC assumes; rather, the Commission was concerned with the distributive inequity of saddling *certain* carriers with a disproportionate share of the empty-repair-move burden. 3 I.C.C.2d at 604. Characterized property, the Commission's "revenue adequacy" and "accounting change" explanations are complementary, not antagonistic.

Still, LOSAC charges that the Commission's "accounting change" justification by itself does not withstand scrutiny. It is argued that *Indiana Harbor II* is a good deal more than a simple change in accounting methods; granting railroads permission to charge "initially" for empty-repair moves will enable carriers to shift these costs (or at least some of them) to car providers, in violation of the Act's implicit discretion that railroads bear the costs of owning railcars used in fulfillment of their common-carrier obligations. *See, e.g.*, 49 U.S.C. § 11121 (a) (1982) (providing that rail carriers "shall furnish safe and adequate car service"); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915) (same). Car providers, according to LOSAC, are not assured that they will, in turn, be able to pass the costs of empty-

repair moves back through to carriers through mileage allowance charges, contract offsets, or otherwise. This is so because in recent years carriers have proved reluctant to update allowances in accordance with increases in costs of ownership, and have imposed arbitrary "caps" on mileage formulas. Under the ICC's recent decision in *LO Shippers Action Comm. v. Aberdeen & Rockfish R.R. Co.*, 4 I.C.C.2d 1 (1987), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), moreover, railroads have no obligation under the Interstate Commerce Act to reimburse car providers, through allowances, for their *complete* cost of ownership. Instead, the statute permits the Commission, in exercising its discretionary power to regulate car allowances, to look beyond historical costs to car providers to such factors as conditions in the railcar market. *See* 49 U.S.C. § 11122(b) (1982) ("In determining the rate of compensation [to car providers], the Commission shall consider . . . the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply."); *LO Shippers Action Comm.*, 4 I.C.C.2d at 10. LOSAC therefore contends that it was flatly wrong for the Commission to assume that empty-repair-move costs would continue to be borne by carriers.

To be sure, the Commission may have been a bit facile in its initial opinion in suggesting that its decision involved only an accounting change that would have little or no impact in determining who—as between carriers and car providers—would bear the burden of the costs involved. In its order on rehearing, however, the Commission conceded that car providers may be unable to recoup completely the costs of empty-repair moves from railroads, just as conditions in the railroad market might prevent providers from recovering on a dollar-for-dollar basis their other costs of ownership. And the Commission reiterated, in any event, that the statute simply does not guarantee providers full cost recovery.

We see nothing irrational in the Commission's approach, as clarified on rehearing, toward accounting for empty-repair move costs. It is quite incorrect to assume, as petitioners do, that the Interstate Commerce Act requires the Commission to treat empty-repair-move costs differently than other costs of owership. As the Commission observed, it would be anomalous to segregate the empty-repair-move component of ownership costs for separate treatment:

> The railroads' obligation to compensate car owners for costs of ownership still exists, but the most plausible statutory basis for discharging that obligation within the regulatory framework of published rates is section 11122, which governs private car compensation generally.

Order on Reconsideration at 2. Private car providers have no statutory right to insulate themselves from market forces generally in fixing allowances to be paid by carriers for the use of railcars. It follows that providers have no right to sequester the empty-repair-move component of ownership costs from market forces either. As the Commission stated in *LO Shippers Action Comm.*, "allowing market based car hire returns, instead of prescribing fixed returns, best accommodates the various factors [the Commission is] required by [section 11122 of thhe Act] to consider." 4 I.C.C.2d at 14. It seems reasonable, we think, for the Commission to conclude that what is appropriate for ownership costs generally is perfectly appropriate for the discrete ownership costs at issue in this case.

The foregoing analysis, in our opinion, fairly disposes of petitioners' related charge that it was irrational for the Commission to attempt to solve a problem of *inter*-carrier cost allocation with the solution of an *extra*-carrier (car provider) charge. The argument assumes, in the first instance, that an extracarrier charge for empty-repair moves is otherwise illegitimate under the

Act, an assumption that the Commission has adequately rebutted. The Commission made clear, moreover, that it was the anomaly of treating empty-repair-move costs differently than other costs of ownership (as a collective responsibility of the railroad industry rather than a cost to be borne in direct proportion to a carrier's use of private railcars in the line-haul carriage of freight) that produced the problem of intercarrier cost misallocation. Petitioners' argument, it seems to us, runs aground on section 11122 of the Act, which plainly contemplates initial railroad charges for freight movements with a "pass-back" of ownership costs to carriers through allowances.[14]

B.

Petitioners also contend that the Commission failed to pay heed to numerous legally relevant considerations in fashioning its empty-repair-move policy in *Indiana Harbor II*. It is argued that, prior to reversing *Indiana Harbor I* and allowing carriers to charge for empty-repair moves, the ICC should have undertaken an examination of the techniques by which car providers would be able to recoup empty-repair-move costs from railroads. In other words, because the Commission rested its deci-

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[14] Petitioners' assertion that the railroads' imposition of empty-repair tariffs constitutes "double-charging" for empty moves in violation of sections 10701(a) (prohibiting unreasonable practices) and 11121(a) (prohibiting unreasonable car service practices) of the Act is hyperbole. It is by no means necessarily true that the railroads will be able to "double-charge" for empty-repair moves under *Indiana Harbor II*. Rail tariffs are influenced by a number of factors of which the cost of railcar ownership is only one; depending on conditions in the relatively discrete freight transportation and railcar markets, railroads may over- or underrecover from shippers the costs of railcar ownership passed through to them by car providers. The Commission, in all cases, remains empowered to respond to specific practices in connection with railroad payment of allowances under section 11121(a). In the order under review, in fact, the Commission reserved such issues as the legitimacy of mileage allowance caps and the like for future proceedings on a case-by-case basis. *See Indiana Harbor II*, 3 I.C.C.2d at 615.

sion in part on the assumption that car providers could use mileage allowance systems and other measures to recover empty-repair-move costs, the Commission was obliged *in the same proceeding* to engage in full-scale scrutiny of those recovery systems.[15]

We disagree. We are persuaded that the Commission need not have undertaken the elaborate inquiry into mileage allowances requested by petitioners in the *Indiana Harbor II* proceeding. Petitioners do not complain of any *regulatory* obstacle to recovery of empty-repair-move costs from carriers, a concern that might warrant immediate Commission attention. Instead, the car providers cite market forces alone as impeding full recovery. But the Commission has recently decided to allow market forces to influence rates of compensation to car providers, *see LO Shippers Action Comm.*, 4 I.C.C.2d at 13-14, and we see no reason why the Commission should be prevented from giving the market some opportunity to assimilate repair-move costs before entertaining a challenge to the adequacy of mileage allowances under section 11122.

The Commission reasonably determined, moreover, that at least some of the mileage-allowance recovery issues raised by petitioners, such as the propriety of railroad mileage caps, involve the effectiveness of allowances in enabling car providers to recover costs of ownership *generally*, and do not bear directly or exclusively on repair-move costs. And, the Commission observed that it was presently entertaining caps and allowance questions in other proceedings. Petitioners fail to show why their rights under section 11122 would not be protected in a separate adjudication. We have no legitimate grounds, under these circumstances, to quarrel with the Commis-

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[15] To the extent petitioners' argument stems from the notion that the Interstate Commerce Act requires dollar-for-dollar recovery of the car providers' complete costs of ownership, we have adequately addressed it above. *See supra* p. 18.

sion's procedural determination concerning the limited scope of the *Indiana Harbor II* proceeding. "[A]gencies . . . need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may address itself to the phase of the problem which seems most acute to the [regulatory] mind.'" *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

Petitioners also assert that the Commission arbitrarily neglected to consider those long-term contractual relationships between railroads, car providers, and shippers which were negotiated in reliance on *Indiana Harbor I*. We are told that many car manufacturers lease railcars to shippers who, in turn, "provide" the cars to railroads for the transportation of freight. Under typical agreements, the manufacturer-owner receives a flat-rate lease payment from the lessee while the lessee pockets any mileage allowances paid by railroads;[16] no mention is made in these agreements of empty-repair-move charges, because *Indiana Harbor I* severely restricted the circumstances under which such charges could be assessed by carriers. Superimposing *Indiana Harbor II*'s regime on these arrangements, it is asserted, will require manufacturer-owners to remit empty-repair-move charges to the railroads without any means of recovering these payments from the car lessees. Similarly, petitioners contend that shippers who have negotiated long-term contract rates with carriers, *see* 49 U.S.C. § 10713 (1982) (providing authority for, and regulating, contract rates for rail transportation in lieu of published tariffs), which rates presumably incorporate an offset amount reflecting the shippers' cost of providing railcars but do not cur-

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[16] While mileage allowances, under prevailing practices, are tendered by railroads to manufacturer-owners, petitioners assert that the typical lease agreement requires the owner to credit these allowances to the lessee.

rently account for the possibility of shipper-borne empty-repair charges, will be harmed by *Indiana Harbor II*.

The gist of petitioners' objection, it seem to us, is that the Commission's previous policy induced railroads, car providers, and shippers to do business one way, and that these settled business practices cannot be overridden by developments in the Commission's regulatory policies no matter how compelling the statutory justifications. This argument assumes incorrectly, we think, that industry practices may prevent the Commission from implementing even a justified and well-explained departure from previous policy. That is simply not sound administrative law. *See Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935) ("when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity"); *New England Tel. & Tel. Co. v. FCC*, 826 F.26 1101, 1110 (D.C. Cir. 1987); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

Petitioners' last objection to the reasonableness of the Commission's decision is that the ICC neglected to devote sufficient attention to numerous alternative intercarrier schemes—not requiring the reversal of *Indiana Harbor I*—that allegedly would cure intercarrier cost allocation problems. The Commission failed, we are told, to discuss the option of "intercarrier pooling," under which railroads would pool a percentage of their line-haul freight revenues for distribution among carriers in proportion to their repair-movement burden. Other options, such as intercarrier litigation over "excess" line-haul receipts and more adequate parent contributions of a portion of their line-haul freight revenues to their switching subsidiaries, were allegedly dispensed with by the Commission without adequate consideration or explanation. This "'artificial narrowing of options,'" according to petitioners, cannot be countenanced. *International Ladies Garment Workers Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (quoting *Pillai v. Civil Aeronautics Board*, 485 F.2d 1018, 1027 (D.C. Cir.

1973)); *see State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 46-48.

This is not a case, however, where the Commission labored under a misperception that the policy ultimately selected was "the only available alternative." *Pillai*, 485 F.2d at 1027. The record reveals that the Commission deliberated upon all three "alternatives" advanced by petioners prior to settling on the option of allowing empty-repair move charges. *See Indiana Harbor II*, 3 I.C.C.2d at 611-13. The "intercarrier litigation" alternative was reasonably viewed as "complex, costly, and impractical" given the extreme difficulty of determining the extent to which a particular "overcompensated" carrier has been enriched at the expense of a complaining switching carrier. *Id.* at 612-13. The "parent-subsidiary contribution" alternative, while it might redress imbalances between certain discrete carriers, was also viewed as ill-suited to the resolution of an industry-wide problem because not all undercompensated switching carriers are owned by overcompensated line-haul carriers. *Id.* at 612. Finally, the record was deemed inconclusive on the question of the viability of intercarrier pooling of line-haul freight revenues; "little was said by the parties about it" even though the alternative was identified by the Commission in soliciting public comments. *Id.* at 613. The Commission reasonably believed, nevertheless, that permitting carriers to charge for repair moves was simpler than "establish[ing] a second elaborate system of allocating repair-movement responsibility among individual carriers," as "systems are already in place for handling other private car repair and car supply costs." *Id.* at 614.[17] No further consideration of the alternatives

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[17] The Association of American Railroads argues that the ICC has no authority to direct carriers to contribute to an intercarrier pool. *See* 49 U.S.C. § 11342 (1982). Since the Commission did not embrace this view, however, we cannot consider the point in testing the Commission's consideration of available alternatives.

proffered by the car providers, in our view, was legally required.

We conclude, therefore, that the Commission's empty-repair-move policy is based both on a permissible construction of the Interstate Commerce Act and on reasoned scrutiny of the legally relevant considerations. The only question that remains is whether or not the Commission could lawfully apply its new controlling principle to the parties before it in *Indiana Harbor II*.

IV.

Petitioners advance two arguments against the lawfulness of "retroactively" sanctioning the repair-move charges filed by the IHB and the BOCT and challenged by shippers in *Indiana Harbor II*. First, they characterize the Commission's action in *Indiana Harbor II* as a rule, which, under the Administrative Procedure Act, may be given prospective effect only. Second, petitioners argue that even if *Indiana Harbor II* is labeled an adjudication, retroactive application of the Commission's new empty-repair-move policy to the parties in this case violated fundamental principles of fairness. We find neither argument persuasive.

We need not dwell at length on petitioners' assertion that *Indiana Harbor II* was a retroactive rulemaking. The former policy largely prohibiting empty-repair-move charges was articulated in an adjudicatory proceeding, and *Indiana Harbor II* itself was an adjudication. It seems to us presumptively reasonable that a controlling principle announced in one adjudication may be modified in a subsequent adjudication, and petitioners offer little to question that presumption here. As we have said before, "[a]djudicatory decisions do not harden into 'rules' which cannot be altered or reversed except by rulemaking simply because they are longstanding." *See Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976). Petitioners conceded at argument that, in selecting a controlling

principle to govern the dispute before the Commission in *Indiana Harbor II*, the Commission was at the very least empowered to apply that principle in the future to similarly situated parties. Indeed, basic tenets of administrative law *require* the Commission to apply its rules consistently in adjudicatory proceedings. *See generally Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-09 (1973). That *Indiana Harbor II* established an adjudicatory policy to be applied in the future, as well as to the parties before the Commission, is thus of no moment.

Petitioners point to the Commission's requests for public comments under 5 U.S.C. § 553 and contend that that procedure somehow "converted" *Indiana Harbor II* into an informal rulemaking, *see* 50 Fed. Reg. 10,867 (1985); 49 Fed. Reg. 39,740 (1984), thereby rendering retroactive application of the empty-repair-move policy unlawful. Yet petitioners cite no authority for their theory that an adjudication is converted into a rulemaking solely because an agency solicits and entertains the comments of those who have an interest in prospective application of the principle under study, and we have found none. Certainly, the practice of permitting amicus filings in judicial proceedings has never been thought a basis for equating judicial decisions with legislation. So we reject petitioners' novel contention.

Relying on our opinion in *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), petitioners argue in the alternative that even if *Indiana Harbor II* is regarded as an adjudication, retroactive application of the new empty-repair policy is contrary to law. Petitioners purport to apply the five-factor balancing test [18] set forth in *Retail, Wholesale* and insist

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[18] Among the considerations that enter into a resolution of the [retroactivity] problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an

that the statutory interest in applying the new rule to the parties' dispute in *Indiana Harbor II* is outweighed by the inequity involved in disappointing the car providers' reasonable expectations in reliance on longstanding Commission precedent. Of course, as the Supreme Court has observed, every administrative case in which a new or modified controlling principle is announced "has a retroactive effect," and such retroactivity is "not necessarily fatal to its validity." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). And because the Administrative Procedure Act does not countenance agency use of adjudicatory powers to announce rules of prospective effect only, *see NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (opinion of Fortas, J.); *id.* at 777 (dissenting opinion of Douglas, J.); *id.* at 780 (dissenting opinion of Harlan, J.), it seems clear that the circumstances in which a rule may be announced but not applied in an adjudication are few. In part for this reason, courts have interpreted the *Retail, Wholesale* test to bar retroactive application of a new rule only when such application would work a "manifest injustice." *Clark-Cowlitz Oper. Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

We do not find the parties' reliance interest in the *Indiana Harbor I* regime to be so great as to warrant the conclusion that retroactive application of the *Indiana Harbor II* empty-repair policy works a "manifest injustice." Soon after the IHB and the BOCT filed their empty-repair tariffs but prior to their effective date, the

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abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390.

parties sought ICC suspension of the tariffs as unlawful, *see* 49 U.S.C. § 10707 (1982) (providing Commission suspension authority); *Southern Ry. Co. v. ICC*, 681 F.2d 29 (1982) (describing suspension power), yet the ICC declined to exercise its interim authority. If this action alone did not suggest to petitioners that *Indiana Harbor I* was being drawn into question, the Commission's 1984 order staying the Review Board's decision that struck down the tariffs removed all doubt about the Commission's inclination. In that order the Commission indicated that the railroads had a "substantial" chance of prevailing in defense of their empty-repair-move tariffs. Thus, for most of the period for which petitioners claim retroactive application of *Indiana Harbor II* is unfair, petitioners have been aware of *Indiana Harbor I*'s vulnerability. The parties' reliance interest in *Indiana Harbor I* must be discounted accordingly.

Turning to the other side of the equation, we (like the Commission) think the statutory interest in having *Indiana Harbor II* apply retroactively is significant in this case. The record before the Commission provided abundant support for its conclusion that the IHB and the BOCT were receiving insufficient compensation through line-haul freight traffic for their handling of empty-repair movements, a predicament in tension with the Staggers Act's objective of providing carriers an opportunity to earn adequate revenues. Under the circumstances, we believe it was perfectly appropriate for the Commission "to apply the law in effect at the time it render[ed] its decision." *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974).

For the reasons stated, the petitions for review are

Denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE,
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO.,
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.,
ASSOCIATION OF AMERICAN RAILROADS,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors

and Consolidated Cases No. 87-1171 and 88-1284

Petitions for Review of an Order of the
Interstate Commerce Commission

Before: SILBERMAN, WILLIAMS and SENTELLE, *Circuit Judges.*

JUDGMENT

[Filed April 14, 1989]

These causes came on to be heard on the petitions for review of an order of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Wendy Jenuis
for CONSTANCE L. DUPRE
Clerk

Date: April 14, 1989

Opinion for the Court filed by Circuit Judge Silberman.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed June 30, 1989

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION
UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE,
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO.,
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.,
ASSOCIATION OF AMERICAN RAILROADS,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors

No. 87-1171

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS,
BALTIMORE AND OHIO CHICAGO TERMINAL
RAILROAD CO., *et al.*,

CHEMICAL MANUFACTURERS ASSOCIATION,
MBF INDUSTRIES, INC.,
Intervenors

No. 88-1284

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents

ASSOCIATION OF AMERICAN RAILROADS, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO., *et al.*,
Intervenors

On Petition for Rehearing of Petitioners and Intervenors

Before SILBERMAN, WILLIAMS and SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing of petitioners and intervenors, filed May 26, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

A statement of Circuit Judge Silberman is attached.

SILBERMAN, *Circuit Judge*, joined by WILLIAMS and SENTELLE, *Circuit Judges, concurring in the denial of rehearing.*

Petitioners' primary claim in its petition for rehearing is that *Indiana Harbor II* was a rulemaking, unsuitable for retroactive application, because the Interstate Commerce Commission determined to seek industry comment on the issues framed by the parties to the adjudication. We rejected petitioners' argument, however, that the mere supplementation of an adjudicatory proceeding with comment procedures more commonly employed in a rulemaking necessarily means that the resulting procedure is rulemaking *per se*. Nothing in the Administrative Procedure Act restrains an agency from receiving (and crediting) comments in adjudicatory proceedings from nonparties who will inevitably be affected by the agency's contemplated change-in-course, whether through intervention or otherwise. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536 (1970) ("the prescription of an adjudicatory hearing does not preclude an agency from allowing widespread industry and public participation through intervention and preservation of testimony in written affidavits"); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 931 (1965) ("even in the course of adjudicatory proceedings, agencies are not powerless to permit general comment on proposed rules if they wish to do so").[1] Indeed, the courts and commentators that have suggested the inappropriateness of adjudicatory proceedings for certain matters have focused their attention on the unfairness of declining to give *nonparties*

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[1] The National Labor Relations Board appears to have followed this course in many of its adjudicatory proceedings. *See, e.g., General Cable Corp.*, 139 N.L.R.B. 1123 (1962); *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958).

notice and an opportunity to be heard in advance of the agency's selection of a new or altered governing principle. *See, e.g., Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 494-97 (2d Cir. 1973), *rev'd*, 416 U.S. 267 (1974); 2 K. DAVIS, ADMIN. L. TREATISE 96 125-26 (1979); *cf. NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (opinion of Fortas, J.); *id.* at 777-79 (opinion of Douglas, J.); *id.* at 780-81 (opinion of Harlan, J.). I think *Indiana Harbor II*, which was *begun* as an adjudication by certain of the petitioners with the filing of a complaint against the railroads for their assessment of empty-repair-move charges, retained its fundamental adjudicatory character throughout.[2]

Underlying petitioners' argument that *Indiana Harbor II* was a rulemaking, it would appear, is the notion that an adjudicatory proceeding was an inappropriate forum for the Commission to have made a "legislative-type" judgment reversing its longstanding empty-repair-move policy. But the Supreme Court has repeatedly emphasized that the choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). And when the Second Circuit Court of Ap-

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[2] It is unproductive, in most circumstances, to attempt to "classify a given proceeding as either adjudicatory or rulemaking. The line between the two is frequently a thin one and resolution of a given problem will rarely turn wholly on whether the proceeding is placed in one category or the other." *City of Chicago v. FPC*, 458 F.2d 731, 739 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). *But see Hoffman-LaRoche, Inc. v. Kleindienst*, 478 F.2d 1, 12-13 (3d Cir. 1973) (character of proceeding—whether adjudicatory or rulemaking—viewed critical given agency's failure to follow functional separation requirements of 5 U.S.C. § 554). Here, of course, the characterization of the proceeding below is important, for it bears directly on the propriety of retroactive application of the new governing principle. "[R]etroactivity is not only permissible but standard" in the adjudicatory setting, *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 478 (1988) (Scalia, J., concurring), but it is disfavored in rulemaking. *See id.* at 471.

peals, in reliance on reasoning virtually identical to that subscribed to by petitioners, determined that a significant reversal in NLRB policy could not, under the circumstances, be effected through adjudication, the Supreme Court unanimously reversed, holding that the Board was "not precluded from announcing new principles in an adjudicative proceeding." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (reversing *Bell Aerospace Co. v. NLRB*, 475 F.2d 485 (2d Cir. 1973)). While arguments no doubt can be advanced in support of limiting agencies' policymaking use of the adjudicatory form to circumstances where "legal consequences hinge upon the interpretation of statutory requirements, and where no pre-existing interpretive rule construing those requirements is in effect," *Georgetown Univ. Hosp.*, 109 S. Ct. at 480 (Scalia, J., concurring); *compare Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982), *with id.* at 1011-12 (Reinhardt, J., disenting from denial of rehearing *en banc*), the law of this circuit is emphatically to the contrary. *See, e.g., Airmark Corp. v. FAA*, 758 F.2d 685, 691-92 (D.C. Cir. 1985); *Hatch v. FERC*, 654 F.2d 825, 837 (D.C. Cir. 1981); *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 816 (D.C. Cir. 1980); *Office of Communications of United Church of Christ v. FCC*, 590 F.2d 1062, 1070 (D.C. Cir. 1978); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *but cf. American Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) (suggesting that rule established by rulemaking procedures can be modified or altered only by rulemaking procedures). What this case really reduces to is the fairness of retroactive application of the new principle developed in *Indiana Harbor II* to the adjudicatory parties, a question I believe is adequately addressed in the original panel opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

LO SHIPPERS ACTION COMMITTEE, *et al.*,
Intervenors

And consolidated cases No. 87-1171 and 88-1284

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

[Filed June 30, 1989]

The suggestion for rehearing *en banc* of petitioners and intervenors has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald and Circuit Judge Buckley did not participate in this matter.

APPENDIX E

ICC 132 *Served March 12, 1987*

INTERSTATE COMMERCE COMMISSION

No. 35404 [1]

GENERAL AMERICAN TRANSP. CORP.

v.

INDIANA HARBOR BELT RAILROAD CO.

Decided February 17, 1987

Commission overrules *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338 and *General American Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102, and finds that rail carriers may charge for movements of privately owned cars to and from private facilities for ordinary maintenance and repair. Car suppliers should recover those costs with other costs of ownership through mileage allowances as market conditions permit. Relief sought in No. 39380 denied. Both proceedings discontinued.

DECISION

BY THE COMMISSION:

We are reversing the decision in *General American Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102 (1977) [2]

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[1] This decision embraces No. 39380, *General American Transp. Corp. et al. v. Baltimore and Ohio Terminal Railroad Co., et al.* (No. 39380).

[2] *Aff'd sub nom. Indiana Harbor R. Co. v. General Am. Transp.* 577 F.2d 394 (7th Cir. 1978).

(*Indiana Harbor*) and are allowing carriers to file tariffs containing charges for hauling empty, privately owned cars to and from repair facilities. We find that the existing policy prohibiting tariff charges misallocates economic burdens among carriers and conflicts with the Congressional mandate for demand-based rail pricing, rate flexibility, and revenue adequacy expressed in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) and the Staggers Rail Act of 1980. These charges are more properly considered a cost of repair to be included in the computation of mileage allowances that the railroads pay the shippers.

INTRODUCTION

Railroads have an obligation to provide cars necessary to transport the commodities that they hold themselves out to carry. *Allied Corp. v. Union Pacific Railroad Company* 1 I.C.C. 2d 480, 483 (1985). They may fulfill this obligation by furnishing their own cars or by using cars supplied by other carriers or private parties. *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 63 (1940).

Under 49 U.S.C. § 11122(b), "[t]he rate of compensation to be paid for each type of freight car shall be determined by the expense of owning *and maintaining* that type of freight car * * *" (Emphasis added.) The cost of repair is a cost of car ownership and is factored into the mileage allowance that the railroads pay to private car owners to reimburse them for providing the cars.[3]

Private car owners often perform maintenance and repair work themselves or contract it out to private repair firms. Association of American Railroads (AAR) proce-

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[3] Section 11122 also requires consideration of factors other than ownership cost, such as efficiency of car use and the national level of ownership, which may justify payment of allowances that do not fully cover ownership cost when, for example, the supply of cars exceeds the demand.

dures state that carriers should route cars in need of repair to repair shops designated by the car owner. However, carriers have not generally been permitted to charge for those movements. Past Commission decisions hold that, once private cars are put into service they are considered "instrumentalities of transportation" and their movement for repairs is considered the *collective* responsibility of the railroad industry. In *Union Tank Car Co. Terminal Service*, 268 I.C.C. 338 (1947) (*Union Tank*), the Commission concluded that such private cars were not "property" within the meaning of then-section 6(7) of the Act[4] and thus were not subject to charges because they do not lose their status as instrumentalities of transportation when taken out of service temporarily.

Indiana Harbor, *supra*, followed earlier Commission precedents and found that a railroad could not levy a direct charge for transporting privately owned cars (tank and others) to and from repair facilities if it derived more than *de minimis* revenue from loaded movements of such cars. 357 I.C.C. 126-27. The decision held that a railcar moving to or from a repair facility could either be considered the movement of "property" on which a transportation charge could be imposted, or an instrumentality of transportation, where no charge could be imposed for moving it. The decision explained that, for a car to to be treated as an instrumentality of transportation, a carrier must derive some economic benefit, direct or indirect, from its movement or use. Direct benefit was found to occur when the carrier derived revenue from the movement or use of the car. The Commission held an indirect economic benefit occurred when a carrier made use of private cars in general to fulfill its common carrier obligations.

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[4] Former § 6(7) stated, in essence, that except as otherwise provided, no carrier shall transport "passengers or property" unless its charges are published in an effective tariff. Section 6(7) has been recodified without substantive change in 49 U.S.C. § 10761(a).

In the *Indiana Harbor* decision, the Commission found that the Indiana Harbor Belt Railroad (IHB) derived more than a *de minimis* economic benefit from the use of private cars, since it earned substantial revenue from switching loaded movements of privately owned cars. The decision further found that the tank car 105% equalization rule[5] appeared to be a workable solution to the prob-

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[5] The mileage tariff for tank cars imposes an "equalization" rule which is used to encourage private tank car owners to handle their fleets more efficiently and reduce empty mileage. The 105% equalization rule provided that, if aggregate empty mileage accumulated annually by tank cars bearing the reporting mark(s) of any one company or person exceed the aggregate loaded mileage by more than 5%, then the assignee of the reporting mark(s) shall pay for such excess empty mileage at a stated mileage charge. Certain mileage was not included in the equalization accounting; namely: (1) mileage on empty cars moving on revenue bills; (2) loaded or empty mileage caused by railroad handling error; (3) repair movements required because of railroad damage; and (4) mileage accumulated due to (a) use of longer routes for railroad convenience, (b) detours, and (c) Commission service orders.

Carriers submit detailed monthly mileage reports to the assignee of each reporting mark showing the actual loaded and empty mileage for all cars bearing each reporting mark and send a duplicate of that summary report to the AAR. Provisions are made for adjusting errors.

Annually each carrier sends AAR a summary of total loaded and empty mileage aggregated on its line during the calendar year, separated by reporting marks. The AAR adds the loaded and the empty mileage reported by all carriers for cars assigned to each company or person, and if empty mileage exceeds loaded mileage by more than 5% AAR sends a bill for the excess at the rule's mileage charge. It then distributes the charges thus collected to the carriers in the proportion that each carrier's portion of excess mileage bears to the total excess empty mileage.

The current equalization rule is essentially the same. Under it private tank car owners are assessed a current charge of 32¢ per mile for all empty miles accumulated during a calendar year that exceed total loaded mileage by more than 6%. The equalization accounting now excludes excess mileage resulting from Department of Transportation mandated retrofit programs and from an AAR mandated car protection program. Also the current equalization

lems of tank car under-compensation experienced by IHB and other railroads due to their excessive empty nonrevenue mileage.[6] Consequently, it ordered IHB and other undercompensated carriers to participate in the equalization rule. The decision also recognized that § 15(18) of the Interstate Commerce Act (the Act) (as amended by § 202(d) of the 4R Act) required the Commission to establish expeditious procedures for permitting publication of separate rates for distinct rail services. However, the decision concluded that, since repair movements are necessary to the movement of freight in all revenue service, switching for repairs could not be considered a distinct rail service.

Subsequent to the *Indiana Harbor* decision, the Commission decided several cases in which separate charges for private car repair moves were allowed, including one in which a concurring opinion describes the *Indiana Harbor* ruling as "bad law and bad policy" that should ultimately be overturned because it results in harmful cross subsidization and rate averaging.[7] Also, in *Indiana Harbor* the Commission did not fully consider the overall

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rule now includes for accounting purposes mileage caused by railroad error, railroad damage, railroad convenience, detours, and service orders.

The equalization rule does not apply to privately-owned covered hoppers and other non-tank cars. Covered hoppers are subject to a "back-to-back" rule, which currently provides that they are subject to a mileage charge of 32¢ per mile for the second of any consecutive empty line-haul movements.

[6] The Commission noted the need for an equalization rule or similar provision to spread the cost of empty repair movements for private cars, other than tank cars. Until such rule or provision was instituted, the Commission stated that IHB, if it accrued excess empty mileage, could bring a complaint against those carriers which it could identify as having received excess revenues and as being responsible for IHB's undercompensation.

[7] No. 38792, *Switching Charges for Privately Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982.

impact and direction of the then-recent 4R Act. Moreover, the subsequently enacted Staggers Act made even greater changes in the way railroads are regulated, including pronounced policy shifts away from cross subsidization and rate averaging.

Against that background, IHB decided in early 1983 to publish separate charges for empty repair movements not preceded or followed by a loaded revenue movement. Shortly after that, The Baltimore and Ohio Chicago Terminal Railroad Company (BOCT) did the same. Private car owners [8] filed complaints challenging these actions in No. 39380.[9] The Administrative Law Judge (ALJ) held for the defendants (IHB and BOCT) and found that the ruling in *Indiana Harbor* should no longer be applied because of subsequent legislative changes. The ALJ's decision was reversed by the Review Board by decision served June 13, 1984. The Board held that the case was governed by the decision in *Indiana Harbor* and that the collection of charges by defendants for the switching of empty privately-owned cars to facilities for cleaning, lining, relining, maintenance, modifications, or repairs was an unreasonable practice in violation of 49 U.S.C. §§ 10701(a) and 11121(a)(1). Complainants filed a petition for administrative review.

Because this proceeding raised serious questions about the continuing validity of the *Indiana Harbor* ruling, we issued a notice served October 9, 1984, and published at 49 Fed. Reg. 39,740 (1984) requesting comments and informing the public that we might modify or reverse

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[8] For convenience we shall use the term private car owners to refer to the entire scope of private car interests, including lessors, lessees, and shippers.

[9] Complainants in No. 39380 are General American Transportation Corporation (GATC), General Electric Rail Car Services Corporation (GE Rail), and Union Tank Car Company (Union Tank). (When the complaint was filed General Electric Rail Car Services Corporation was North American Car Corporation.)

the ruling in *Indiana Harbor* as conflicting with the revenue adequacy, rate flexibility, and car service provisions of the 4R Act and the Staggers Act. We reopened the record in *Indiana Harbor* so as not to foreclose any options in our consideration of the appeal in Docket No. 39380.

Pursuant to our notice, we received not only initial comments from a number of parties but also certain reply comments, verified statements, and motions to strike.[10] In order to consider all issues deemed pertinent by the various participants, we issued a further notice in which we denied the motions to strike, described a broad range of concerns we desired the participants to address, posed a number of questions, and solicited additional comments and reply comments.[11] Additional comments, and reply comments were filed.[12]

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[10] Comments were filed by The Baltimore and Ohio Chicago Terminal Railroad Company; Union Pacific Railroad Company and Missouri Pacific Railroad Company (jointly); Elgin, Joliet and Eastern Railway Company; Norfolk and Western Railway Company and Southern Railway Company (jointly); Consolidated Rail Corporation; LO Shippers Action Committee; Evans Products Company; Railway Progress Institute Committee on Tank Cars; Union Equity Co-operative Exchange; complainants in No. 39380; United States Steel Corporation; Trinity Industries Leasing Company; Interstate Railcar Service, Inc.; MBF Industries, Inc.; Mobil Oil Corporation; Phillips Petroleum Company; Pacific Molasses Company; Committee on Transportation and Distribution of The Society of the Plastics Industry, Inc.; and Chemical Manufacturers Association.

[11] Notice served March 15, 1985 and published in the *Federal Register* at 50 Fed. Reg. 10,867 (1985).

[12] Comments following this additional solicitation were filed by complainants in No. 39380; Railway Progress Institute Committee on Tank Cars; LO Shippers Action Committee; Phillips Petroleum Company; Indiana Harbor Belt Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Elgin, Joliet and Eastern Railway Company; The Kansas City Southern Rail-

PRELIMINARY MATTERS

In their petitions for administrative review, IHB and BOCT requested oral argument. Granting such requests is discretionary. *See* 49 C.F.R. § 1116.1(d). We conclude that oral argument is unnecessary to resolve the issues presented, and therefore deny IHB's and BOCT's requests.

Phillips Petroleum Company moves for leave to file its reply comments several days late. Acceptance of those comments will not prejudice any party. Accordingly, Phillips' motion is granted.

DISCUSSION AND CONCLUSIONS

The major issues that we will discuss are: (1) Is the *Indiana Harbor* rule currently working efficiently and equitably? (2) Is the *Indiana Harbor* rule lawful and in conformity with the legislative changes of the 4R Act and the Staggers Act? and (3) Alternative remedies to the *Indiana Harbor* rule.

A. *Is the Indiana Harbor rule currently working efficiently and equitably?*

As noted, the *Indiana Harbor* rule provides that movement of empty private rail cars to repair facilities is to be without charge when there is more than a *de minimis* economic benefit. We have reviewed the comments and find that the rule does not produce an efficient or equi-

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way Company; the Association of American Railroads; and the Eastern and Southern Railroads.

Reply comments were filed by complainants in No. 39380; LO Shippers Action Committee; Railcar Repair Association; Railway Progress Institute Committee on Tank Cars; Phillips Petroleum Company; The Baltimore and Ohio Chicago Terminal Railroad Company, the Association of American Railroads; and the Eastern and Southern Railroads.

table system of compensating rail carriers for repair moves.

In deciding to impose the *Indiana Harbor* rule, the Commission was aware of the difficulties of directly charging those carriers who benefited from the use of private cars for the empty repair movements. The Commission stated in *Indiana Harbor*, at 127, that:

> The need for such repairs of privately owned cars will usually arise as a result of use by many different carriers over a considerable period of time. Each such carrier is partially responsible for the need for repairs, and ideally the costs should be charged to each carrier accordingly. However, such an apportionment is impossible as a practical matter. The costs of moving "instrumentalities of transportation" must be compensated for in such a manner that no carrier which accrues a greater than average portion of these costs will be unduly burdened. Rather than costs for which precise compensation for particular services is possible, the costs of repair movements of privately owned cars must be treated as a common cost which must be shared by all carriers which derive revenue from the national private-car fleet. These "shared costs" must be compensated for as evenly as possible, for the absence of a comprehensive nationwide scheme to distribute the cost burden in proportion to the amount of economic benefit enjoyed by individual carriers from private car use would lead to a situation in which some carriers would be overcompensated while others would indeed be performing "free" transportation.

Recognizing the potential pitfalls in compensating carriers for repair movements, the decision concluded that the equalization plan was a workable solution, but clearly recognized that potential problems still remained to be ironed out.

The carriers in their comments have made it clear that under the *Indiana Harbor* rule the costs of the repair movements have unfairly been placed on certain railroads who make a disproportionate number of repair moves. Most often the railroads that bear the costs of repair movements are terminating roads. The effect is that these carriers are subsidizing other carriers who have benefitted from the use of loaded private cars. A carrier may not even have participated in loaded movements at all as to many of the cars it is called on to transport to repair sites. Yet, the *Indiana Harbor* rule sets only the *de minimis* benefit test.

These problems are particularly troublesome for IHB and BOCT. Both carriers have a number of repair shops on their lines. From 1978 through 1982, IHB switched 5,805 cars to repair shops and the same number from those facilities. If switching charges had applied, its revenues would have been approximately $856,452. However, during this period its recovery under the tank car equalization rule was only $96,263. Since it transported loaded cars in greater than *de minimis* quantities, it rightfully owed some contribution to repair move costs. While no precise calculations can be made, it is evident, however, that IHB bore repair move expenses greatly out of proportion to its own responsibility for them.

BOCT kept no records of repair moves prior to its tariff change that complainants challenge, but it estimates that it averaged 33 no-charge repair moves daily and considers its burden to be disproportionate.

Other carriers complain of disproportionate burdens. The major tank car facility on Kansas City Southern's lines is at Zwolle, LA. Most cars moving to Zwolle for repairs come from Beaumont, TX. That requires a 292-mile, round-trip movement at no charge. The nearest interchange point for repair ship movements is Shreveport, LA, 62 miles away. Union Pacific (UP) and Missouri Pacific (MP) estimate that together they are ab-

sorbing $850,000 annually by their inability to charge for repair shop movements.[13] In summary, it is evident, even without enough data to compute the exact extent of undercompensation that carriers such as IHB, BOCT, Kansas City Southern, UP, and MP face, that the *Indiana Harbor* method of handling repair movements results in substantial cross subsidization among carriers in general.

In *Indiana Harbor*, shipper interests argued that the 105% equalization rule formed a workable solution to the problems of carriers such as IHB, that carriers would be compensated for any excess empty repair mileage, and that an ongoing study and a rulemaking in Ex Parte No. 328 *Investigation of Tank Car Allowance System*, would afford an opportunity for correcting any problems.[14] *In-*

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[13] UP and MP also make passing reference to storage moves, and Kansas City Southern claims it is forced to store cars for free when private repair facilities are full. However, that issue is outside the scope of this proceeding.

[14] Complainants (private car owners) and their supporters now argue that the absence of expressions of dissatisfaction with the tank car equalization rule by rail carriers during the Ex Parte No. 328 renegotiations conducted under the reopening order in *Investigation of Tank Car Allowance System*, 367 I.C.C. 48 (1982) is evidence that undercompensation for repair moves is not a significant problem. They argue that, if the equalization rule is failing to result in a fair allocation of repair move expenses the rail carriers would have raised that issue in the negotiations.

The carriers respond, however, that, although there was limited discussion of repair moves, the railroads did not attempt to negotiate the issue because (1) the matter is in litigation in these proceedings; and (2) the railroads believe such expenses should be part of the mileage allowance system instead of the equalization rule. We take official notice that the renegotiated agreement submitted in Ex Parte No. 328 expressly provides that repair move expenses paid by tank car owners are to be included in the repair expenses data used in arriving at tank car mileage allowances. This in part explains the railroads" lack of need further to reconsider the equalization rule during the recent negotiations. Moreover, there are other aspects of the rules that were not agreed to and further study is ongoing.

diana Harbor, at page 120. Stating that a more developed record might lead to different conclusions, the Commission, as noted, decided that the 105% equalization rule reflected a more equitable approach to the allocation of responsibility for the repair-movement practical problem than any other solution proposed at that time. *Indiana Harbor*, at 128-129, 135, and 137.

We can now see, however, that, although IHB received some compensation under the equalization rule, it was not nearly enough, and the source of such funds was payment for the mileage in excess of 105% (now 106%) that was mainly designed to represent shipper-responsibility, empty operations such as transfers. The equalization rule does not deal with intracarrier allocation of repair movements although they ostensibly were to be compensated adequately by the 5% element. Yet that is where the main misallocation lies. As noted, the railroad industry overall is responsible for the costs of ordinary repairs to private cars that carriers use in their loaded operations, but, as demonstated earlier, there is no necessary relationship between each carrier's share of repair move responsibility in terms of loaded revenue miles and its participation in repair move operations. Since the equalization rule does not deal with that problem, then *a fortiori* it cannot prevent misallocation and cross subsidization. Some other solution is therefore needed.

B. *Is the Indiana Harbor rule lawful and in conformity with the legislative changes of the 4R Act and the Staggers Act?*

Prior to our discussion of a solution to the repair movement problem, we will re-examine the "instrumentalities of transportation" and "distinct rail services" prinicples as applied in *Indiana Harbor.*

1. *The instrumentality of transportation issue.*

A basic foundation upon which *Indiana Harbor* was decided was the application of the "instrumentality of

transportation" principle. We must re-examine it to see whether it was and still is sound or legally required.

The 1947 *Union Tank* decision, *supra*, reversed a Division opinion that switching empty tank cars for repairs is transportation of "property" for which charges should be assessed. Although the cars are "property" within the broad meaning of the term, *Union Tank* states that, when they are in use as instrumentalities of transportation, whether owned by a carrier or a private owner, they are not "property" within the meaning of then § 6(7) of the Act. The decision held that such cars do not lose their instrumentality of transportation status when taken out of service temporarily, and, accordingly, that they are not subject to charges for line-haul movements or switching movements within terminals.

The Commission went on to state that the question of whether the mileage allowance includes the cost of repair switching has no important bearing on the issue. The evidence in that proceeding indicated that allowances were determined with the understanding that repair switching would be done without charge and those costs would not be included within the allowance, but the decision says that, if the repair switching costs were included in the allowance, the proper remedy would lie in readjustment of the mileage allowance and continuance of the practice of switching without charge.[15]

The *Union Tank* approach, however, was established in an era when rate averaging and cross subsidy were

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[15] As a dissenting opinion noted: (1) in *Use of Private Passenger Train Cars*, 155 I.C.C. 775, 786 (1929), the Commission said that charging for repair moves was acceptable; and (2) in *Sioux City Term. Ry. Switching*, 241 I.C.C. 53 (1940) the Commission stated that mileage allowances were supposed to cover all costs of supplying private cars, including repair move switching costs. Union Tank did not expressly overrule those cases, but its treatment of empty repair movements has been the standard since then.

commonplace, often encouraged and clearly deemed acceptable. Indeed, prior decisions in *Indiana Harbor* take a similar approach by adopting a nationwide, averaging solution. The 4R Act's legislative history notes that a cross subsidization policy had been part of public transportation since the beginning of Commission regulation, but that that policy should be changed.[16]

Union Tank reached its conclusion without detailed analysis. Instrumentalities of transportation are by definition equipment whose costs are a responsibility of railroads because such equipment enables them to meet their common carrier obligations. The key to understanding the *Union Tank* holding is knowing that the customary way of handling such matters then was through collective responsibility. In that setting, it was rational simply to treat "instrumentalities of transportation" as a category for which charging was improper. Now, however, a closer look at the situation is required.

Section 6(7) and its successor section forbid carriers from transporting passengers or property unless rates and regulations are filed and published in accordance with other parts of the Act. However, the former § 6(7) mandate does not prohibit the collection of charges.[17] It merely requires that rates be published in tariffs before chargeable transportation operations are performed. That leaves unaddressed the question of the lawfulness or unlawfulness of initially collecting charges on instrumentalities of transportation pending final railroad settlement of responsibility through the mileage allowance mechanism. Thus, even when it was decided, *Union Tank* did not reflect a thorough legal analysis.

No other statutory section supports the *Union Tank* instrumentality of transportation approach. Section 10747 provides that a railroad may publish in a tariff "a

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[16] S. Rep. No. 499, 94th Cong. 1st Sess., at 11 (1975).

[17] A review board reached this same concluusion in *Midwest Freight Car Co.—Declaratory Order*, 358 I.C.C. 462, 470 (1977).

charge or allowance for transportation or service for property when its owner, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service," and that the Commission may prescribe the maximum reasonable charge or allowance. That language does not prohibit carriers from initially charging for repair moves and then letting the car owners recover those expenses in proper proportion through, for example, mileage allowance payments from carriers using private cars in loaded moves. Section 11122, likewise, does not prohibit carriers from initially charging for repair moves with subsequent recovery by car owners.

The statutory scheme for paying for private cars is based upon the payment of allowances by carriers to car owners. No statutory requirement would be violated if private car owners initially pay repair move costs and then are reimbursed for those expenses through the allowance system. We conclude that *Union Tank's* method of handling repair moves does not presuppose a statutory bar to charging initially for them.

2. *The distinct rail service issue.*

Section 202(d) of the 4R Act amended what is now 49 U.S.C. § 10728 to require that the Commission establish expeditious procedures for permitting publication of separate rates for distinct rail services. In a rulemaking proceeding to implement that directive, the Commission defined distinct rail services as "those railroad transportation services, which are separate from line-haul transportation services necessary for the movement of freight, and for which a specific tariff item is published * * *." *Procedures for Publication of Separate Rates*, 355 I.C.C. 684 (1977) (*Procedures*).[18] *Indiana Harbor* concluded that, since repair movements are necessary to the movement of freight in revenue service, switching for repairs cannot be considered a distinct rail service.

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[18] The regulations are now codified at 49 C.F.R. § 1137.2.

Defendants contend that switching is distinct and separate from line-haul moves. IHB argues that the phrase "necessary for the movement of freight" refers to the nature of the service rather than its purpose. BOCT refers to dictum in a review board decision, No. 38646, *Inland Steel Company v. Illinois Central Gulf Railroad Company* (not printed), served May 24, 1982. The board said that repair moves at issue in that proceeding were a distinct service, but it acknowledged that reaching that issue was not a prerequisite to disposition of the proceeding.

Complainants (private car owners) and their supporters argue: (1) that the Commission is bound by the regulations defining distinct rail services unless they are changed in a reopened rulemaking proceeding; (2) that § 10728 was not changed by the Staggers Act; and (3) that the conclusion in *Indiana Harbor* on this issue is correct and must be followed because it was affirmed on judicial review and also was followed in another court decision, *Evans Products Co. v. ICC*, 729 F.2d 1107, 1109 (7th Cir. 1984).[19]

Separate charges for distinct rail services were permissible under § 6(1) of the Act prior to the 4R Act's amendments (*Procedures, supra*, at 690) and the purpose of the 4R Act's changes was to "promote" separate pricing of distinct rail and rail-related services as part of an overall emphasis on fostering competition.[20] Moreover, the Commission emphasized that a purpose of the regulations was explicitly to state its policy of encouraging the separate publication of distinct rail service rates. *Procedures, supra*, at 690.

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[19] Complainants also contend that, in light of the notoriety of the distinct rail service holding in *Indiana Harbor* and the comprehensiveness of the Staggers Act, the fact that Congress did not choose to amend § 10728 is an indication that it endorsed the continued validity of *Indiana Harbor*.

[20] Section 10728 itself uses the word "promote."

The definition that was initially proposed specifically stated that distinct rail services embraces, but was not limited to, switching and 16 other services. The Commission, however, decided: (1) to use a general definition; (2) to include the phrase "which are separate from line-haul transportation services necessary for the movement of freight" to avoid separate rates leading to a detrimental breakdown of existing line-haul rates; and (3) to make individual determinations on a case-by-case basis. *Procedures, supra,* at 696, 697, and 698, respectively.

Operationally, switching for repairs clearly is distinct from line-haul service, but it is also true that repair movements are necessary for the movement of freight in line-haul service. Line-haul transportation cannot be performed without the use of rail cars, and rail cars cannot be operated over their useful lifespans without periodic maintenance. Thus, this issue is not as simple as considering the separate operational nature of the service alone.

On the other hand, we demonstrate in this decision that the present method of handling repair moves results in harmful cross subsidization that is contrary to the aims of the 4R Act, the Staggers Act, § 10728 (which was intended to promote individual market pricing of different aspects of service) and that the various proposals for making intra carrier adjustments are not reasonably feasible. In light of that we cannot, without further analysis, let the *Indiana Harbor* distinct rail ruling (with its lack of supporting discussion or logic) bar corrective action that is now shown to be needed.

Since the purpose of the "necessary for the movement of freight" language in the regulations was to avoid a detrimental breakdown of line-haul rates, it is appropriate to examine the effect on line-haul rates of a changeover to a system of initial charging for repair moves. Unless that changeover would cause a line-haul rate problem, such separate rates should be promoted.

The revised system, as will be explained, will simply result in different methods of accounting for the repair cost element of private car owners' expenses. In the end, the railroads as an industry bear those expenses under either method, so they would need to consider that aspect along with other factors in setting their rates for loaded movements. Under the *Indiana Harbor* method, the railroads bear the costs of repair expenses other than repair moves by making payments to car owners, and they collectively bear the expenses of repair moves by not charging car owners for that service in the first place. Under a method that would let the railroads charge for repair moves, the car owners may recover those expenses through the mileage allowance system in the same way that they recover other car repair costs. Thus, the difference is in the mechanics of the process the railroads follow in bearing those expenses, rather than in the final result. While retaining ultimate compensation for car owners, the latter method would avoid a disproportionate burden of repair moves among certain carriers.

Consideration of repair move expenses in the line-haul rate is thus not affected by the repair move method used, except possibly to the extent that a particular carrier's significant overburden or underburden under the old system would be reflected in its rate structure. In that case, removal of the cross subsidization factors would have a favorable effect on the existing rate structure rather than cause a detrimental breakdown. The policy of promoting separate charges for distinct services to foster competition outweighs any claimed interest in keeping intact a system that rewards and punishes without relationship to individual costs or revenues.

Accordingly, consistent with the distinct rail service general definition, and as a result of using the implementing rules' case-by-case approach to apply them to specific circumstances, we conclude that the provisions of § 10728 and our implementing rules at 49 C.F.R. § 1137.2 do not bar the adjustment we find necesary in this decision in

the method of handling the costs of moving private cars for ordinary repairs.

3. *Legislative Changes*

We have in earlier decisions found that reconsidering the *Indiana Harbor* decision in light of the significant changes in the Commission's regulation of railroads resulting from the 4R Act and Staggers Act is necessary. The 4R Act provided, among other things, for: separate rates for distinct rail services (§ 202); standards and procedures for establishment of adequate revenue levels (§ 205); a 7% "zone of reasonableness" within which the ICC could not suspend a proposed rate while investigating the proposal (§ 202); and a narrower scope of review of railroad ratemaking generally (§ 202).

The Congress in the Staggers Act mandated the Commission to allow railroads even greater flexibility in setting rates. The Staggers Act encouraged the establishment of demand sensitive rates (§ 217), and greater rate flexibility (§§ 202 and 203).

The new Rail Transportation Policy in the Staggers Act provides that the United States Government shall "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" [49 U.S.C. § 10101a(1)]; "promote a safe and efficient rail transporation system by allowing rail carriers to earn adequate revenues" [49 U.S.C. § 10101a(3)]; and "encourage honest and efficient management of railroads, and, in particular, the elimination of noncompensatory rates" [49 U.S.C. § 10101a (10)].

The rationale of *Indiana Harbor* is in direct conflict with Congressional direction in the statutory provisions of the 4R Act and the Staggers Act. Specifically, the *Indiana Harbor* decision's method of compensation for cars moving empty in repair moves is directly contrary

to current statutory provisions that require the Commission to encourage efficient pricing and provide all carriers with a realistic opportunity to earn adequate revenues. 49 U.S.C. §§ 10701a(b)(3), and 10704(a)(2).

Furthermore, the *Indiana Harbor* approach is also inconsistent with current statutory requirements because it requires carriers to establish rates or free movements which do not contribute to going concern value [49 U.S.C. § 10701a(c)], prohibits individual pricing for distinct services [49 U.S.C. § 10728], encourages cross-subsidization [49 U.S.C. §§ 10101a(10), 10707a(e)(2)], and promotes inefficiency by giving private car owners little or no incentive to consider transportation costs in selecting repair facilities [49 U.S.C. § 10101a(1), (4), (10)].

C. Alternative remedies to the Indiana Harbor rule.[21]

1. *Complainants' proposed solutions.*

Complainants (private car owners) contend that IHB's and BOCT's undercompensation results from the refusal of their connecting carriers to pay them an adequate switching allowance out of the line-haul rates. However, since the problem is caused by the lack of proportionality among carriers with regard to loaded movement and repair movement participation, increasing divisions of reve-

[21] Although we requested comments on market dominance jurisdictional threshold applicability and repair move rate reasonableness levels, there is widespread agreement among the parties that those matters are not formally at issue here. We agree, because complainants in No. 39380 do not challenge the reasonableness of the level of repair move rates that IHB and BOCT published. Instead they question those carriers' right to make any charge by departing from Indiana Harbor's system of collective carrier responsibility that is implemented by simply not charging for repair moves. Market dominance and rate reasonableness issues that may arise in the future regarding charges for repair moves can be addressed in the same way they are addressed for rates in general.

nue on loaded movements will not remove misallocation of repair movement costs.[22] *Indiana Harbor*, at 126, noted that in an earlier proceeding the Commission had "assumed" that any inequality in revenue empty repair-movement mileage would be corrected by divisions of revenue. However, *Indiana Harbor* itself, at 131, found division of revenue adjustments to be an inappropriate way to solve the disproportionate repair movement problem.

Complainants also note that IHB and BOCT are owned by other carriers and argue that the Commission should find that IHB and BOCT recover their empty repair switching costs through their owners' participation in line-haul rates on commodities transported in private cars. Since disproportionate repair moves is a general problem not limited to IHB and BOCT, that argument would not suffice even if it were acceptable. Other carriers, including the parent railroads, may be overburdened or underburdened by repair movements since the relationship to loaded movements is left to chance. In any event, we agree with the conclusion in *Indiana Harbor*, at 127, that the Commission should not "pierce the corporate veil" unless there is strong evidence that the corporate form is being ignored and abused.[23] There is no proof that such a situation exists in this proceeding.

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[22] As we have described, repair movement carriers sometimes may not have participated at all in the loaded movements that led to the need for repairs. There would be no opportunity to correct the situation by the allocation of revenue from loaded movements in that situation. Nor need a percentage payment based on loaded miles (i.e., the equalization formula) fairly compensate a carrier, as the number of repair shops on its line will have no relation to its participation in revenue hauls.

[23] A similar conclusion in No. 38792, *Switching Charges for Privately-Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982, was affirmed on judicial review in *Evans Products Co. v. I.*, 729 F.2d 1107, 1110 (7th Cir. 1984).

Another suggestion by complainants (following up on *Indiana Harbor's* suggestion to this effect) is that IHB and BOCT file complaints against carriers they can identify that received excess revenues and are responsible for IHB's or BOCT's undercompensation. We must conclude, based on the lack of any such complaints since *Indiana Harbor* was decided, that this was never a realistic option. Moreover, undercompensated carriers lack the data necessary to file complaints against overcompensated carriers. Obtaining it through discovery would be complex, costly, and impractical. For example, determining which carriers over a period of time and many miles of operation had transported a particular car in loaded operations leading up to a particular repair move might by itself be very complex and it likely would be economically unjustifiable. The overall problem involves cumulative effects of many patterns of specific operations and thus is much broader in scope than that.

Moreover, even if a pattern of certain loaded movements and repair movements with some cars would be readily identified and the imbalance between the two types of movements determined, the "overcompensated" carrier would not necessarily reasonably owe the "undercompensated" carrier anything because only isolated studies would have been made and the former carrier's "overcompensation" on such specific traffic might not reflect its overall position. Furthermore, the complaint-filing approach reflects expectation of a remedy only in the more extreme cases, but the cross subsidy problem is a general one. Accordingly, complaint filing is not a satisfactory solution.

The remaining alternative that complainants and their supporters suggest is the pooling of the repair-movement cost element in line-haul rates for distribution among repair-movement carriers according to their relative participation. They suggest that the details of such an ar-

rangement would be an appropriate subject for a future rulemaking proceeding.

Although this pooling suggestion was one of the "Possible Remedies" discussion topics in our March 15, 1985, decision that authorized the filing of additional comments and replies by all interested persons, little was said by the parties about it. The Eastern and Southern Railroads argue that this approach includes a premise that line-haul rates include a discrete cost element, and that the premise is erroneous because rates are set by market forces instead of by mechanically computing costs.

No conclusion can be made on this record that the suggested pooling solution is viable. Because so many opportunities have already been provided for commenting on the repair-movement issue, it would be unreasonable further to delay final consideration of this matter pending institution of another proceeding. In any event, we believe there is a simpler alternative, as the following discussion explains.

2. *Repair-movement charging, with a passback through mileage allowances.*

The railroads argue that the present convoluted system is unneeded because repair costs could be recovered through the mileage allowance system in the same manner other private cars are recovered. We agree. Allowing carriers that transport private cars to repair shops to charge initially for those movements would avoid the cross subsidy now experienced.

This method appears to be the most efficient, fair, and least disruptive way of handling the matter. There would be no need to establish a second elaborate system of allocating repair movement responsibility among individual carriers because mileage allowance systems are already in place for handling other private car repair and car supply costs, and repair movement costs could be treated

the same way. This approach follows basic business practice, whereby each production process participant is paid directly for his goods and services and all such costs are combined to determine the overall production expense. As our discussion above shows, the alternatives supported by private car owners are not suitable, effective substitutes.

Although some railroad contentions at earlier stages seem to be to the contrary, the Association of American Railroads (AAR), and virtually every carrier that filed comments in response to the March 15, 1985, reopening order acknowledge that, if charges for repair moves are made, the car owners may pass them back to the railroads as repair expense elements in mileage allowance computations. Union Pacific Railroad Company suggested the use of that method to remedy the problems caused by the existing situation.

Private car owners contend that allowing carriers to charge for repair moves would result in double payment because line-haul rates already reflect car supply costs. Line-haul rates frequently are set at levels determined by competitive factors without necessarily tracking all costs closely. Nonetheless, carriers' use of private cars in performing their operations obligates them to compensate car owners. The carriers' recognition that private car repair move expenses, if paid by car owners, are properly included as repair expenses in mileage allowances, addresses private car owners' double payment contentions. This proceeding's proper remedial focus is on a mechanism for proper allocation of railroad private car repair expenses without either "free" transportation or double compensation. Individual rates for repair moves will be subject to review under § 10701a.

The private car owners argue: (1) that they would not be made whole if the system were changed because mileage allowance "caps" imposed by carriers prevent recovery of car ownership costs; (2) that the railroads

argue that cost recovery should be through allowances, yet they seek to avoid full costs recovery in favor of demand-based payment; and (3) that this proceeding would not deal with these inequities directly or effectively.

Mileage caps are deviations from negotiated mileage formulas. Caps set an upper limit on the mileage allowance a railroad will pay. That limit is below the amount that would result if the carrier adhered to the negotiated formula. However, the Commission is examining caps in other proceedings, such as No. 39909, *Cap on Mileage Allowances for use of Privately Owned Tank Cars, SP.* Where a cap has not been justified, the Commission has ordered it withdrawn. *See* No. 39908, *Mileage Allowances for Covered Hoppers, Grain & Grain Products, BN* (not printed), served December 5, 1985. In the future, a mileage cap may or may not be reasonable, depending, on the circumstances. The renegotiated tank car agreement in *Investigation of Tank Car Allowance System* 3 I.C.C.2d 196 (1986), authorizes caps in special circumstances, yet provides for automatic investigation of tank car mileage allowance caps when requested by an affected party. The cap issue, which involves mileage allowances overall, not just the repair movement aspect, belongs in such other proceedings.

The same is true of the issue of the effect of changes in supply and demand on the level of mileage allowances. The prior tank car allowance formula was renegotiated because it failed adequately to account for the effects of supply and demand. However, the parties agreed on formula changes that we have now approved. The new tank car agreement increases allowances during periods of car shortage and decreases them during periods of car surplus. This approved agreement thus covers the supply and demand issue regarding tank cars.

In relation to covered hoppers, we are affirming in No. 39117, *Lo Shippers Action Committee v. Aberdeen and*

Rockfish Railroad Company, et al.[24] that ownership cost is not the only factor we must consider in evaluating car compensation under 49 U.S.C. § 11122. Other statutory considerations, such as efficiency of car use and the national level of car ownership may justify payment of allowances that do not fully cover ownership cost when the supply of cars greatly exceeds the demand. However, the fact that car allowances do not fully insulate car owners from adverse market conditions does not change the fact that the railroads' contribution to coverage of private car ownership costs should come directly through allowances rather than indirectly through devices such as uncompensated repair moves that constitute inefficient and inequitable cross subsidies.

Another argument car owners make is that initial charging and then recovery through allowances will transfer the averaging problem from the railroads to them. The Railway Progress Institute, Committee on Tank Cars, notes that cost data used in determining tank car allowances are furnished only by four tank car companies, not by owners of the entire fleet, because many shipper-owners are unable to furnish the required data. Those four major tank car companies comprise the Committee on Tank Cars making this argument. Other owners supply cars under such circumstances by their own choice. They could seek to participate in the data input process if they chose.

Moreover, to the extent that any private car supplier has higher than average repair movement expenses it has an incentive to find ways to reduce those costs by becoming more efficient. That is consistent with sound economic principles. The method used for supplying data is an already existing one for allowances overall, and not unique to repair movements.

We conclude that allowing carriers initially to charge for repair movement services and permitting carriers and

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[24] Open Voting Conference held February 24, 1987.

private car owners to treat those expenses just like other repair expenses recoverable through the mileage allowance system appears the most appropriate solution suggested in this proceeding. While we do not require it, we commend it to the parties for consideration.

D. *Other issues*

Complainants in No. 39380 contend that the 1977 *Indiana Harbor* decision is *res judicata* of their complaint against defendant IHB and has a similar preclusive effect against BOCT even though that railroad was not a party to the 1977 proceeding. They argue that, whether or not the principle of *Indiana Harbor* should be overturned for the future, the Commission cannot fail to apply that principle in the present and past.[25]

Res judicata rests on the principle that a controversy should only have to be resolved once. It applies to administrative determinations when the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate. *United States v. Utah Constr.*, 384 U.S. 394, 421-422 (1966); 4 *Davis, Administrative Law Treatise*, § 21:2 at 49-51 (2d ed. 1983).

However, because the factual issues resolved in the prior proceeding involved private car repair movements in the early 1970's and we are now dealing with such movements made since early 1983, *res judicata's* protection against relitigation of the same claim or cause of action does not apply even to IHB, which was a party to the earlier proceeding. The claim or cause of action is different. *Davis, supra*, at 59, for example, notes that "a classification of imports is *res judicata* only with respect to the same merchandise, not with respect to later merchandise, even if the questions of law and fact are the same," citing *U.S. v. Stone & Downer Co.*, 274 U.S. 225 (1927).

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[25] Complainants characterize the reopened No. 35404 portion of these proceedings as a "rulemaking (legislative) portion."

In a broader sense, though, *res judicata* includes collateral estoppel, sometimes called issue preclusion, which potentially applies here because the factual setting is very similar to the situation covered by the 1977 decision.

However, "[collateral estoppel] is not meant to create vested rights in decisions that have become obsolete or erroneous with time * * *." *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). "*Res judicata* should not prevent an agency, after a decent interval, from testing the question whether law or policy concerning continuing practices may have changed." *Davis, supra*, at 60. "A determination that a continuous practice is lawful for one period of time is not necessarily *res judicata* for a later period of time." *Davis, supra*, at 60, citing *FTC v. Raladam Co.*, 316 U.S. 149 (1942). *Davis, supra*, at 51, also notes that the second Restatement of Judgments (1982), in § 83, recognizes the applicability of *res judicata* to administrative determinations but that there are exceptions, including one that "protects against *res judicata* when it 'would be incompatible with a legislative policy.'" Finally, the Supreme Court has stated that:

> [T]he [Interstate Commerce] Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practices. * * * [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices * * *.

American Trucking v. *A. T. & S. F. R. Co.*, 387 U.S. 397, 416 (1967).

Thus, the principles on which complainants rely do not result in an absolute bar against reassessing as to IHB and BOCT the way empty repair move compensation is handled. Changes in circumstances since the prior decision was issued have to be considered. Clearly there was a "decent interval" between the 1977 decision and the time in 1983 when IHB and BOCT changed their tariffs. Moreover, the *Indiana Harbor* decision itself contains statements reflecting uncertainty and noted that "potential problems still may remain to be ironed out." 357 I.C.C. 102, at 135. It recognized that the problem of excessive, empty nonrevenue mileage is preplexing and stated that the equalization rule "appears" to be a workable, equitable solution. *Id.* It also noted that "a more developed record might lead to different conclusions." *Id.*, at 128.

In addition, as we noted above, the Commission did not fully consider the overall impact and direction of the then recent 4R Act; and the Staggers Act has made even greater changes in the way railroads are regulated. Cross subsidization is a crucial issue in this proceeding. Since the 1977 decision was issued, there has been a pronounced shift away from a regulatory climate that accepts such effects.

Complainants argue that the changes we are now considering involve the exercise of a legislative, or rulemaking, function, and, accordingly, that any changes should apply only prospectively. The question in No. 39380 thus is whether the change we are adopting should apply retroactively.

Davis, supra, at 43, states that "retroactive overrulings that seem to be a part of the normal growth and development of law are not only tolerated *but are very common.*" (Emphasis added.) That treatise also notes, at 24, that "The technique that seems to be in the ascendancy is to limit an overruling to prospective effect but to ap-

ply the overruling retroactively in the overruling case." It likewise notes, at 23, that "The main guide for what agencies should do about retroactive overruling is what courts do." In *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), the Supreme Court stated the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

Nothing in the Staggers Act or its legislative history prohibits retroactively applying in No. 39380 the change we approve in this decision. Indeed, the policies of the Staggers Act encourage the tariff changes that IHB and BOCT made. In respect to No. 39380, our review is limited to the lawfulness of the tariffs and, given our findings in regard to the validity of *Indiana Harbor*, we find that the complained of tariffs are lawful.

We further conclude that there is no manifest injustice in finding those repair movement charges lawful. IHB's and BOTC's burden under the present system is very disproportionate. By the time they made the tariff changes challenged, major changes in regulatory policy had taken place that emphasized individual carrier freedom and disapproved of collective approaches which result in averaging or cross subsidization. The 1977 decision had been questioned in other Commission decisions. Overruling the 1977 decision is a normal development in this Commission's regulatory role, rather than an unfair, unexpected, and sudden change.

Moreover, the record shows, in fact, that such charges are already being included in the mileage allowance computation data with regard to tank car repair moves. A witness for the Railway Progress Institute acknowledges that the updating of allowances for September 1, 1984, and September 1, 1985, did include some charges for empty repair moves. A witness for the AAR testified

that: (1) in the Ex Parte No. 328 renegotiations a subcommittee unanimously agreed in February 1984 that when repair move charges are assessed they are part of overall repair costs in the mileage allowance formula; (2) that several leasing company representatives said they were presently including such expenses in the annual cost of ownership study; and (3) that this information was conveyed to the joint negotiating committee and was received without objection.

In its November 1984 comments, Chemical Manufacturers Association contended that, if *Indiana Harbor* is overruled, and carriers are allowed to charge for repair movements, that such charging should not begin until an improved mechanism is in place to implement the changeover. It made that argument because the 1979 tank car agreement averages maintenance costs over a three-year period and it would take four years for allowance payments to offest newly-imposed repair costs. That matter has been mooted, however, by subsequent changes in the tank car agreement. The renegotiated agreement filed July 1, 1985, makes specific changes from three-year averages to 12-month updates on maintenance cost data and expressly states that repair movement charges shall be included in such data.[26]

We recognize that, for the changeover we are approving to be fully effective, there will have to be a change in the mileage equalization rule. The carriers and private car interest in Ex Parte No. 328 already plan to restudy the 106% equalization ratio and the mileage charge to determine whether charges are needed. It is inappropriate for us to change the equalization rule in this case. Accordingly, at this point we will leave the matter to the parties in interest.

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[26] *See* the last sentence of § 3(a) of the revised agreement in the appendix to *Investigation of Tank Car Allowance System.* 3 I.C.C. 2d 196 (1986).

Finally, we note that, while the discussion in this proceeding focused on tank cars, it was because the evidence presented tended to reflect the tank car experience. The vast majority of privately owned cars are tank cars and covered hoppers. This decision, however, applies equally to all types of private car repair moves and the problems and changes discussed in respect to tank cars also have general application to other car types.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Railroads may charge initially for moving private cars to and from repair shops.

2. The complaint in No. 39380 is dismissed and complainants' petition for reparations is denied.

3. These proceedings are discontinued.

4. This decision is effective April 13, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons, Vice Chairman Lamboley dissented.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

No. 35404 [1]

GENERAL AMERICAN TRANSP. CORP.

v.

INDIANA HARBOR BELT RAILROAD CO.

Decided: February 22, 1988

By a petition filed April 1, 1987, The Railway Progress Institute Committee on Tank Cars (RPI) seeks reopening and reconsideration, based on allegations of material error, of our prior decision, 3 I.C.C.2d 599 (1987). The decision announced a change in policy to permit railroads, regardless of the carrier's degree of participation in related revenue movements, to charge for the movements of privately owned cars to and from private facilities for ordinary maintenance and repair. By a letter petition filed April 13, 1987, American Petroleum Institute (API) also seeks reopening and reconsideration. Phillips Petroleum Company (Phillips Petroleum) and the Chemical Manufacturers Association (CMA) filed reply comments in support of RPI's petition. The Baltimore and Ohio

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[1] This decision embraces No. 39380, *General American Transp. Corp. et al. v. Baltimore and Ohio Chicago Terminal Railroad Co., et al.* (No. 39380).

Chicago Terminal Railroad Company (BOCT) and Indiana Harbor Belt Railroad Company (IHB) (jointly) and the Association of American Railroads (AAR) filed replies in opposition.[2]

BACKGROUND

This proceeding began as a complaint in No. 39380 against tariff charges for private car repair moves by IHB and BOCT. An Administrative Law Judge ruled in favor of defendants. A review board reversed, holding that the decision in *General American Transp. Corp. v. Indiana Harbor*, 357 I.C.C. 102 (1977) (*Indiana Harbor I*), precluded such charges. In our March 12, 1987, decision (*Indiana Harbor II*), we overruled *Indiana Harbor I*. We had previously published a notice that we were re-examining the policy of *Indiana Harbor I*, and extensive comments were filed by interested parties.

Indiana Harbor I forbade the railroads (with certain exceptions) from imposing tariff charges for movements of private cars to and from repair facilities. The rule was based upon the railroads' overall obligation to supply equipment and the derivative principle that private cars, when put into service, become instrumentalities of transportation, and their movement for repairs becomes the collective responsibility of the rail industry. In *Indiana Harbor II*, we rejected that premise. We found that the policy against individual carriers charging for movements of private cars to repair facilities resulted in serious misallocation of economic burdens among carriers and

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[2] By joint petition filed July 24, 1987, RPI, CMA, and the AAR requested that a decision on the petition to reopen be deferred pending negotiations among railroads and private car owners on changes to the mileage allowance formula, the equalization rules, or other related matters, in light of the Commission's decision in this proceeding. However, they later concluded that there was no present need to negotiate, and on September 2, 1987, withdrew their joint petition to defer action.

conflicted with Congressional mandates. We considered various alternatives, and concluded that the most appropriate way of handling the matter was to allow rail carriers to charge for these movements. We suggested, but did not require, that private car owners could use the mileage allowance system to obtain appropriate compensation for the repair movement costs they incur, just as they do to recover other private car repair and car supply costs.

DISCUSSION AND CONCLUSIONS

RPI argues generally that, under the system announced in *Indiana Harbor II*, the car owners will ultimately bear at least some of the cost of repair moves. It claims this violates both the law and Commission policy. It argues this violates both the law and Commission policy. It argues that only complete reimbursement, which cannot be assured through mileage allowances, will be in accordance with the law. RPI further contends that the Commission essentially disregarded all difficulties with recovery through the mileage allowance system by noting that it commends, but does not require, recovery through that system.

We disagree. In *Indiana Harbor II*, while we did not reject the railroads' overall responsibility for repair movements, we did reject the prevailing *means* of compensation: an outmoded, impractical, and irrational prohibition against tariff charges for repair movements charges based upon the theory that private cars were instrumentalities of transportation. Instead, we recognized that, in moving cars for repairs, the railroad is performing a distinct rail service for which a tariff charge should be made under the provisions of 49 U.S.C. 10728 and 49 CFR 1137.2 *et seq.*

The railroads' obligation to compensate car owners for costs of ownership including repair movements still exists, but the most plausible statutory basis for discharging that obligation within the regulatory framework of pub-

lished rates is section 11122, which governs private car compensation generally. That section, as we discussed in *Indiana Harbor II*, requires that private car compensation reflect not only costs of ownership, but the sometimes conflicting considerations of the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars. Slip op. at 14-15. Thus, it does guarantee that individual car owners will receive their overall costs of ownership, let alone dollar for dollar reimbursement of one specific element of ownership costs: repair moves. *See Lo Shippers v. Aberdeen & Rockfish Ry Co., et al.*, 4 I. C.C.2d 1 (1987); and *Car Service Compensation—Basic Per Diem Charges*, 1 I.C.C. 2d 742 (1985).

It is true that we commended, rather than required, car owners to seek recompense through mileage allowances. However, this was simply an acknowledgement that the primary issue in this proceeding is the lawfulness of tariff charges for repair moves, rather than the suitability of alternatives open to car owners for recouping those costs. Nevertheless, we thoroughly considered and discussed all objections to the tariff charge-mileage allowance passback approach, as well as all suggested alternatives to that approach offered by complainants.

RPI argues that we did not consider the effect of *Indiana Harbor II* upon contract rates, and of lessor/lessee agreements made in reliance on *Indiana Harbor I*. Phillips Petroleum raises the same issue. Contracts and lease agreements were not discussed, for the simple reason that no party raised the issue. Our failure to discuss something that the parties could have made part of the record, but did not, is not material error. *ICC v. Parker*, 326 U.S. 60, 73-74 (1945).

However, a fundamental legal principle controls: voluntary private contracts cannot bind Congress or this Commission to maintenance of the regulatory status quo. RPI's contention that parties entering into transportation

contracts and car leases have an incontrovertible right to rely continually on the legal principle established in *Indiana Harbor I* is equivalent to the *res judicata* and collateral estoppel arguments that were made, thoroughly discussed, and rejected in *Indiana Harbor II*, at 616-617.

Furthermore, RPI does not have a constitutional right to a regulatory guarantee that it will be free of future regulatory acts that may affect the fortunes of its business. When parties negotiate under an existing regulatory scheme they do so at their own risk. That scheme may later be affected by regulatory reform. The fact that such reform may change the basis of past and present contractual relationships cannot be a bar to the normal evolution of the regulatory process. *See, e.g., Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 747, 771-772 (1983), *reversed on other grounds, Brae Corporation, et al.* v. *ICC & USA*, 740 F.2d 1023 (D.C. Cir. 1984) *cert. denied*, 471 U.S. 1069 (1984). *See also American Airlines v. CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied* 404 U.S. 1015 (1972). We find RPI's position here particularly unpersuasive inasmuch as it had sufficient notice of the fact that *IHB I* was becoming increasingly out of step with the prevailing regulatory and industry environment. Post *IHB I* decisions began clearly to regard *IHB I* as "bad law and policy" signaling that a change was imminent. *See* No. 38792, *Switching Charges for Privately Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982, *aff'd in part, rev'd in part, on other grounds Evans Products Co. v. ICC & USA*, 729 F.2d 1107 (7th Cir. 1984). Private car owners therefore had sufficient notice that the regulatory environment was in transition. *Box Cars, supra*, 367 I.C.C. at 760-61.

Nevertheless, even if contracts and leasing agreements now in effect were made in reliance upon *Indiana Harbor I*, the public was formally put on notice on October 10, 1984, that the *Indiana Harbor I* ruling might be modi-

fied or revoked, and indications that it might be changed were evident even earlier, after the Staggers Act was enacted in 1980. The car owners thus had ample opportunity to negotiate agreements providing for that contingency, and absent evidence to the contrary, we cannot assume that they did not. Moreover, it is possible that outstanding long-term contracts and leasing agreements that were, in fact, negotiated in reliance on *Indiana Harbor I*, can be renegotiated.[3] Thus, car owners will not be forced permanently, as RPI argues, to bear a cost they cannot recoup from the railroads.

RPI raises once again the issue of mileage allowance caps, arguing that caps prevent private car owners from obtaining complete recovery of repair move costs. We pointed out in *Indiana Harbor II* that the renegotiated tank car mileage allowance agreement contains provisions for dealing with caps and other nonconforming tariffs which provide a lesser allowance than that provided by the mileage allowance formula. These provisions require automatic investigation of such tariffs under the provisions of section 11122. *See Investigation of Tank Car Systems*, 3 I.C.C.2d 196 (1986), *petition for clarification denied* November 11, 1987. We also pointed out that we have investigated caps on allowances for covered hopper cars, and in appropriate cases, ordered them withdrawn. *See* No. 39908, *Mileage Allowances for Covered Hoppers, Grain Products, BN*, (not printed), served December 5, 1986. Again, we emphasize that section 11122 does not require that car compensation reflect a dollar for dollar return of each car owner's actual costs.

RPI further argues that the Commission erroneously concluded that the cost of repair moves is currently reflected in the data used in the computation of mileage allowances. RPI and Phillips Petroleum argue that the

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[3] Contracts often contain clauses to allow renegotiation or cancellation due to changes in law or regulation.

cost data are incomplete, because car owners have not yet incurred such costs.

It is true that car owners had not generally incurred those costs prior to the *Indiana Harbor II* decision. (We note at least two exceptions: The first exception involved charges imposed by carriers having only *de minimis* participation in loaded moves using private cars; they could impose such charges under *Indiana Harbor I*. The second involved IHB and BOCT's repair-move charges that were under investigation in No. 39380, which was decided concurrently with reopened No. 35404 in *Indiana Harbor II*).[4] Concededly, the cost of repair moves initiated by other carriers pursuant to *Indiana Harbor II* are thus not reflected in current mileage allowances. We did not claim otherwise. However, the renegotiated Ex Parte No. 328 agreement contains a specific provision for including repair movement costs,[5] and also provides that the cost and performance factors making up the mileage allowance schedule will be based on 12-month, rather than 3-year average expenses. Thus, such costs presumably will be fully incorporated at the time of the next annual update under the agreement.

Moreover, even if the initial allowance schedule does not fully reflect repair move costs, the overall level of such allowances are based upon many cost and non-cost factors, and we cannot say that (nor have petitioners shown that) car owners will not be adequately compensated, even during the first year.

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[4] Petitioners claim that repair move charges included in mileage allowance updates beginning in September 1984 were switching charges, rather than charges for entire empty repair shop movements. Because of the nature of IHB and BOCT's operations in the Chicago area, their repair move charges were shown as switching charges, but in substance they were charges to move cars to a repair facility.

[5] *See Investigations of Tank Car Systems*, 3 I.C.C.2d 196 (1986), last sentence in section 3(a) of the Appendix.

Finally, specific treatment of repair move costs in the negotiated agreement indicates the Joint Negotiating Committee's awareness of the possibility that the *Indiana Harbor I* rule would be overruled or modified. The Committee also could have provided for the inclusion of anticipated first-year repair move expenses, but did not. It may be that its failure to do so is simply one of the many compromises that were made to obtain a consensus. In any event, RPI was a party to the renegotiated agreement, and cannot now be heard to complain about its terms in the context of this proceeding.[6]

RPI also argues that, because changed mileage divisors are used, the structure of the mileage allowance system itself renders full reimbursement impossible. It gives four examples where reimbursement of repair move costs, for cars of varying values traveling the 5,170 loaded miles (the 1985 study fleet average), would be from 12.1 to 22.5 percent less than the repair move costs the railroads will not collect through tariffs. The AAR, using 7,000 miles of operation, but otherwise following RPI's example,

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[6] In support of its argument that the current mileage allowance does not include repair move costs, RPI also claims that the joint negotiating committee (JNC) specifically intended to defer the matter to future negotiations. There is no support for this proposition, either in the mileage allowance agreement or in the JNC's July 1, 1985 petition for prescription of a new mileage allowance system (joint petition). As noted, the agreement specifically deals with repair move costs. See footnote 4, *supra*. The only matters referred to by the JNC as subjects for future negotiations were the so-called "mileage equalization rule" and related provisions dealing with the handling of empty cars. These provisions, under which the railroads collect charges for empty mileage exceeding 106 (formerly 105) percent of loaded mileage, do not apply to repair moves covered by a tariff—mileage on empty cars moving on revenue billing is specifically excluded from equalization accounting—and thus have no bearing on the question of whether the mileage allowance adequately compensates car owners. (Those empty repair moves not moving on revenue billing would continue to be incuded in mileage equalization accounting).

shows that recovery can exceed repair move costs and that there is an incentive for greater car utilization. Thus, there is no reason to conclude that the private fleet as a whole would be undercompensated in a way that deviates from the plan of the renegotiated agreement. In any event, this argument, like RPI's other objections to the mileage allowance formula, assumes that the law requires precise cost-based reimbursement, an assumption we have previously rejected, and ignores the negotiated character of the renegotiated agreement, and RPI's participation in those negotiations. The mileage divisor changes were made during the Ex Parte No. 328 renegotiations in which RPI participated, and their express purpose was to account for the effects of supply and demand.[7] As noted above, RPI may not properly complain here about the formula it negotiated and we approved in that proceeding.

Finally, although RPI expressly limited its comments filed earlier in this proceeding to prospective application issues, it now also argues that our retroactive approval of IHB and BOCT's repair move charges is unauthorized by law, because recovery will not be complete.[8] Again, we disagree. The test for retroactive approval is fully discussed and correctly applied in *Indiana Harbor II*.

In summary, petitioners' overall contention that complete recovery of repair move costs is required is incorrect. The issue in this proceeding was whether separate charges may be assessed for movements to repair facilities. We found that, because of regulatory policy changes toward greater carrier ratemaking freedom and away from collective approaches that result in cross subsidization, the *Indiana Harbor I* prohibition against charging for repair moves should be overruled. In re-

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[7] This change in the mileage divisors is explained in detail in the JNC's joint petition at pages 13-16.

[8] Complainants in No. 39380 did not seek reopening of our *Indiana Harbor II* decision.

sponse to arguments that double charging would result, we noted that such repair move costs should be treated just like other repair expenses the private car owners initially pay. Nothing more is required in this proceeding.

We conclude that petitioners have failed to establish material error or any other grounds for reopening this proceeding. Accordingly, the petitions will be denied.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petitions to reopen are denied.

2. This decision is effective on its service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons and Lamboley. Commissioner Lamboley concurred in the result.

NORETA R. MCGEE
Secretary

[SEAL]

APPENDIX G

[Service Date Nov. 28, 1983]

INTERSTATE COMMERCE COMMISSION

DECISION

No. 39380

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*

v.

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, *et al.*

Decided: November 22, 1983

By William A. Shue, Administrative Law Judge:

This proceeding was directed for handling under the Commission's modified procedure. The verified testimonies and exhibits are received in evidence.

By complaint filed on or about June 10, 1983, General American Transportation Corporation (GATX), North American Car Corporation (North American) and Union Tank Car Company (UTLX) allege that the collection of charges by Baltimore and Ohio Chicago Terminal Railroad Company (B&OCT) and Indiana Harbor Belt Railroad Company (IHB) for the service of switching empty freight cars owned by GATX, North American and UTLX to and from facilities for cleaning, lining, relin-

ing, maintenance, modification or repair has constituted, and continues to constitute, an unreasonable practice related to transportation or service in violation of 49 U.S.C. § 10701(a), and an unreasonable car service practice in violation of 49 U.S.C. § 11121(a)(1). The complainant also alleges that IHB's failure to participate in the tank car mileage equalization rule of Mileage Tariff ICC PHJ 6007-Series violates the outstanding order of the Commission in Docket No. 36379, *Charges for Moving Empty Private Tank Cars on Own Wheels*, embraced within the decision in *General American Transp. Corp. v. Indiana Harbor*, 357 ICC 102 (1977). A cease and desist order and an award of reparation are sought.

Complainant's Position:

Complainants point out that all of the issues raised by the instant matter have been resolved in their favor in the Commission's comprehensive decision in *General American Transp. Corp. v. Indiana Harbor*, 357 ICC 102 (1977), *aff'd sub nom. Ind. Harbor Belt R. Co. v. General Am. Transp.*, 577 F.2d 394 (7th Cir., 1978). In that proceeding, the Commission reviewed and reconciled all of its previous major cases dealing with the subject of separate charges for the empty movement of privately-owned cars, and made the following unequivocal ultimate findings:

1. The service of switching empty privately-owned cars to and from facilities for repair, etc. is not a "distinct rail service" within the meaning of 49 U.S.C. § 10728(a) (then known as 49 U.S.C. § 15(18) for which a separate rate of charge is appropriate and lawful. 357 I.C.C., at p. 129;

2. Privately-owned cars moving empty to and from facilities for repair, etc. move as instrumentalities of transportation, rather than as articles of freight, if the rail carrier providing such empty transportation derives

more than a *de minimus* amount of revenue from the loaded movement of privately-owned cars of the type in question. 357 I.C.C., at p. 127;

3. The collection of a separate rate or charge for the empty movement of privately-owned cars to and from facilities for repair, etc. is unreasonably and unlawful if such cars are moving as instrumentalities of transportation. Rail carriers may recover the costs of providing such empty transportation only by participating in a mileage equalization rule of national application, or by factoring such costs into their rate level for providing loaded revenue transportation in privately-owned cars. 357 I.C.C., at pp. 127-128, 129-131, 135-138.

The above findings were affirmed in their entirety on judicial review. *Ind. Harbor Belt R. Co. v. General Am. Transp., supra, supra.*

Complainants go on to state that now barely five years subsequent in the instant case, two rail carriers have published separate charges for the empty movements of privately-owned cars to and from facilities for repair etc. of precisely the same nature as those that took place in the above-mentioned proceeding.

Complainants suggest that the reason for the rail carriers' action in publishing such a charge, and for the Commission's conduct in declining to suspend or investigate it, possibly can be found in a concurring opinion recently handed down by Commissioner Frederic N. Andre in Docket No. 38792, *Switching Charges for Privately-Owned Cars Billed to Repair Facilities*, decided October 12, 1982 (not printed). In that proceeding, the Commission distinguished *General American Transp. Corp. v. Indiana Harbor*, supra, in ruling that the collection of a separate charge by the Chicago Heights Terminal Transfer Railroad Company for the service of switching empty privately-owned cars to and from facilities for repair, etc. was reasonable. Commissioner Andre in his concur-

ring opinion stated that it was his view the decision in *Indiana Harbor* was "bad law and bad policy." *Switching Charges for Privately-Owned Cars Billed to Repair Facilities, supra.* Going on, the Commissioner asserted that ". . . . . (s)ound policy requires that railroads be as free as possible to break separate components of a service out of the general rate structure and finance them by separate and distinct charges. This can avoid the harmful results of cross-subsidization and rate averaging. . ."

It should be pointed out that the verified statements of Witness Polcm of GATX, Witness Alicz of North American, Witness Kieras of the UTLX, and Mr. Fauth, a transportation conslutant very familiar with private car costing and rate-making, which follow, establish that the facts which buttressed the Commission's decision in *General American Transp. Corp. v. Indiana Harbor, supra,* in 1977, are no less true and pertinent today in acertaining the reasonableness and lawfulness of the collection by IHB and B&OCT of separate charges for empty movements of private cars to and from repair shops.

Complainants contend that the Commission presented with analogous facts and law cannot legally depart from the determinations made in the cited case that switching empty private cars for repair is not a distinct rail service for which a separate rate or charge would be appropriate and lawful, and that the collection of such a separate charge for switching such cars when moving as instrumentalities of transportation is unreasonable and unlawful.

Defendants' Positions:

B&OCT in its reply to complainants' opening statement point out that what at issue in this proceeding is whether a railroad may collect a separate charge for a separate, distinct service the railroad furnishes and whether the

party that benefits from the service—the car owner—should pay for the carrier for the service it receives, or whether, under the rule of *Indiana Harbor*, the car owner is entitled to have the cost of the service borne by the serving railroads.

Defendant points out that in its verified statements and argument it has shown that the Commission has made considerable inroads into the rule of *Indiana Harbor* since that case was decided. In fact, one Commissioner has publicly condemned the rationale of the case and has called for its reversal. Furthermore, it asserts that the equalization rule and the "benefits rule" of *Indiana Harbor*, whereby carriers that utilize cars of the national fleet are considered compensated for the cars' empty movements to and from repair, have simply not worked. Defendant B&OCT points out that it is unable, without a separate charge, to cover the cost of empty movements. With the passage of the Staggers Rail Act of 1980, Congress has led rail carriers into a new era of competition and pricing freedom. B&OCT recommends that in light of this new emphasis upon innovative ratemaking unbundling of services and separate pricing, the Commission reviews the *Indiana Harbor* decision.

IHB in its opening statement of facts and argument submits that there have been two major developments which necessitate a new review on the part of the Commission concerning the question whether a carrier may assess switching charges on such empty repair moves, provided appropriate tariff items are filed. The charges are as follows: (1) The passage of the Staggers Act in October 1980, and (2) A change in the item giving authority for free empty repair moves in the Mileage Tariff since the previous decision (Item 125 of Maurer's Mileage Tariff 7-B, now Item 190-A of Mileage Tariff PHJ 6007-H) IHB hopes that it will be able to show that these two factors call for a revision of the Commission's position regarding the issue under consideration.

IHB asserts that it is entitled to establish a charge for empty repair moves whenever it is an independent move, not involving a loaded move on it immediately preceding or immediately following the repair move. Furthermore, it contends that Section 10728 of the Staggers Act provides for the establishment of separate rates for "distinct rail services." By limiting the application of its switch charge to independent repair moves not connected to a loaded move, respondent IHB is within the "distinct rail service" clause of this section. Thus IHB points out that its course of action is consonant with the decisions of Review Board No. 2 in *Inland Steel Company v. Illinois Central Gulf Railroad*, I.C.C. Docket No. 38646 (1982) wherein the Commission stated: "Finally, under 49 U.S.C. § 10728, a rail carrier may, on its own initiative, establish separate rates for distinct rail services. This section encourages those services to be priced in accord with cash-outlay incurred by the carrier and the demand for them. Moreover, the Staggers Rail Act of 1980 carries this policy forward. Accordingly, we find the 86/100 mile line-haul movements of the privately-owned coal cars involved to off-time repair facilities is a distinct service, not compensated for under the rate, and the proper subject of a separate charge."

In addition, Section 11121 of the Interstate Commerce Act was amended by the Stagegrs Act to provide with respect to car services, the Commission may compel a carrier to provide a facility or equipment only if the amount spent for the facilities, including return equal to the carriers current cost of capital, will be recovered. IHB indicates that it has established the cost of its switching facilities, including the cost of capital, to be approximately $72.00 per empty car each way. To this is added a small profit of $8.00 which is being dissipated by inflation. IHB points out that there is no way in which it can recover this amount through equalization and it cannot surcharge shippers' loaded moves with this

cost and still remain competitive. The car owner is recovering revenue on these private cars from three sources, namely lease rental from the shipper, mileage paid by user railroads under the Mileage Tariff and revenue for maintenance and repair of the cars. Furthermore, all incidental expenses, such as the switching charges, at issue in the instant matter, are passed on to the shipper/lessee as part of the repair expense under terms of the car lease. The commodity itself is very durable and has a long investment life associated with it. IHE poses the question what justification is there for permitting free empty repair moves under such conditions to the detriment of the railroads generating all the estimated revenue of $856,451.94 for the car owner?

Complainants' Reply:

Complainants in their reply statement conclude that the Commission should carry out without any change whatever its decision in the *Indiana Harbor* case. They point out that given the substantial identity of facts, parties and law in this proceeding and in the *IHB* matter, failure to arrive at the same result would lack a rational basis in law. As the United States Supreme Court recently perceived, deregulatory zeal cannot take the place of rational decision-making.

Discussion and Conclusions:

Prior to February 11, 1983, Paragraph 2A of Item 190-A (tank cars) and Paragraph 2A of Part B and Paragraph 20 of Part C of Item 615-B (other than tank cars) provided, in essence; that privately-owned cars, when released from load, will be moved empty without charge between stations or junction points and facilities for cleaning, lining, relining, maintenance, modification or repair.

Effective February 11, 1983, under independent action of Indiana Harbor Belt Railroad Company (IHB), Items

113-A (tank cars) and 397-A (other than tank cars) were published as exceptions to Items 190-A and 615-B, respectively, and they provided that the movement of empty cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair will not apply to such cars moving to or from facilities served by the IHB unless the empty movement is immediately preceded by or followed by a loaded revenue movement via IHB. In all other circumstances, the charges published in Tariff ICC IHB 8325-series for movement of empty cars on their own wheels to and from repair facilities shall apply. The published charge in Item 210 of ICC IHB 8325-D for the described empty car movement is $80.00 per car in each direction.

Effective March 23, 1983, independent action of the same import was taken by Baltimore and Ohio Chicago Terminal Railroad Company (BOCT) with the publication of Items 62 (tank cars) and 274 (other than tank cars) as exceptions to Items 190-A and 615-B, respectively. However, the per car charges published by BOCT in its ICC BOCT 8000-C and ICC BOCT 8001-C for the described empty car movements, in each direction, are $95.00 in the Chicago, IL, area, and $124.00 at Chicago Heights and Glenwood, IL.

The IHB adjustment was protested by Evans Products Co., North American Car Corp. (NACC), General American Car Corp. (GACC), and Union Tank Car Co. (Union), and considered by the Suspension Board in Case No. 70993. The Suspension Board voted unanimously not to suspend, and Appellate Division 1 denied appeals for reconsideration.

The BOCT adjustment was protested by NACC, GACC and Union, and considered by the Suspension Board in Case No. 71025. The Suspension Board again voted unanimously not to suspend, and Appellate Division 1 denied appeals for reconsideration.

In the above-identified Suspension Board cases, protestants generally alleged that the adjustments violated an outstanding order of the Commission in Ex Parte No. 328, *Investigation of Tank Car Allowance System*, served June 15, 1979 (not printed), and that they contravene the Commission's decision in *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102, which was affirmed on judicial review in *Indiana Harbor Belt R. Co.* v. *General American Transp.*, 577 F. 2d 394, Seventh Circuit. Essentially, the same allegations are made in the petitions in the proceeding at hand.

It should be noted that in the agreement governing tank car mileage allowance as set forth by the parties in Ex Parte No. 328 the tank car mileage equalization ratio called for 106 percent for the calendar year 1979. With respect to the equalization ratio and rules for 1980 and subsequent years the agreement provided that the tank car mileage equalization ratio for 1979 would remain in effect thereafter until material changes in the conditions and practices of tank car movements revealed the need for a new movement study and that appropriate changes in the ratio and rules would then be made to comport with its results.

In a very recent case handed down by the Commission with a service date of November 4, 1983, Ex Parte No. 328, *Investigation of Tank Car Allowance System*, decided October 31, 1983 in which a joint petition was filed by members of the Joint Negotiating Committee (JNC)[1] that requested modification on an interim basis until September 1, 1985, of the formula for computing tank car allowances, the Commission proposed to adopt the following modifications to the 1979 agreement found in Ex

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[1] Association of American Railroads (AAR), American Petroleum Institute, Chemical Manufacturer Association, Corn Refiner Association, Institute of Shortening and Edible Oils, Inc., International Minerals and Chemicals, Railway Progress, Institute, WFIK Partners, and Westway Trading Corporation.

Parte No. 328, *Investigation Of Tank Car Allowance System*, served June 15, 1979:

(1) The interest component in the formula [Section 2(b) of the 1979 decision] will be frozen at the present level of 11.73 percent.

(2) Study fleet maintenance and operating costs [Section 3(a)] shall be calculated and updated annually for groups of tank cars on the basis of age, cars will be divided into six five-year age brackets, and all cars over thirty years of age will be placed in a seventh bracket (collectively, "five-year age groups").

(3) The updated Tank Car Loaded Mileage ("car mile divisor") and Transportation Use Ratio (Section 4) now in use, based on "study fleet" and freight car movement data for the period from 1979 through 1981, will be recomputed for five-year age groups of tank cars and will be frozen until September 1, 1985.

(4) In determining maintenance and operating costs, Tank Car Loaded Mileage, and Transportation Use Ratios, cars that accrued no loaded mileage during any study year would be excluded from compilations of data for that year; and mileage and operating and maintenance costs for all new cars in service less than one year would be annualized to reflect full year operation.

(5) The Maximum Value Bracket [Section 2(d)(3)] on which compensation would be paid for all cars built prior to 1983 would be $64,001-$65,000; for cars built thereafter, the Maximum Value Bracket would be determined as provided in the 1979 agreement, but once a Maximum Value Bracket is finally determined and assigned to cars built in a particular year, it would not be modified in later years.

(6) The interim modifications are not a precedent for, and shall not be used as evidence for any purpose in any

proceeding concerning the amount of structure of national mileage allowances.

The Commission pointed out that the above modifications did not appear to violate any statutory provision or Commission policies, and that they would facilitate the negotiation of a revised tank car allowance agreement. The request is supported by railroads and tank car suppliers.

In *Indiana Harbor*, the Commission ruled that the service of switching empty-owned freight cars to and from repair facilities is not a "distinct rail service" under 49 U.S.C. § 10728(a) for which a separate charge may be collected. The Commission's rationale was that ordinary repairs are an essential part of the movement of freight and not a distinct service in themselves, thus, switching for such repairs could not be deemed a distinct rail service. 357 I.C.C. at 129. In the instant case complainants contend that the Commission cannot legally depart from its determination that switching empty cars for repairs is not a distinct rail service. In addition, they assert that neither the facts nor the law central to that conclusion have changed since the *Indiana Harbor* case was issued in 1977 in a fashion which would call for a different result here. This Administrative Law Judge believes that both of these contentions are not correct. First of all, there is no rule of law that binds an agency to its previous decisions. In other words, an agency is not precluded from re-examining questions previously decided by it in earlier decisions, nor is it foreclosed thereby from reaching different determinations. In *United States v. American Sheet & Tin Plate Co.*, 301 U.S. 402, the Supreme Court stated: "The Commission, so it is said, has approved allowances in instances such as those under review and by a long course of decision has sanctioned the practice; and the claim is that carriers have relied upon the Commission's action in doing plant spotting or making allowance for the performance of that service by

industries. We cannot agree either that the Commission has so decided or that if it had it would be precluded from re-examining the question in the light of existing conditions. . . . But whatever may have been decided in the past, it is evidence that the growth of the practice of making allowances for plant switching and the lack of uniformity in the practice of the carriers with respect to this service properly called for an investigation of the entire situation and the promulgation of appropriate orders to regulate the practice and prevent performance of a service not within the carriers' transportation obligation. The investigation and the consequent orders of the Commission were not foreclosed by its earlier decisions."

However, in the event of a reversal, it is, to be sure, incumbent upon the Commission to furnish an opinion or analysis revealing that the standard is being changed and not overlooked, thus assuring that it is consistent and not unconcerned about the rule of law. *Columbia Broadcasting System, Inc.* v. *F.C.C.*, 454 F2d 1018, 1026.

Times have changed since the *Indiana Harbor* case. We see extensive legislation enacted subsequent to that proceeding. The Staggers Act essentially permits rail carriers to exact whatever they wish for rail services. Furthermore, the 4-R Act encouraged separate pricing for distinct rail services. To be sure, the Commission has stated that this does not refer to the supply of cars. However, the crux of the issue in the instant case is whether legislation enacted subsequent to the above-mentioned cases has sufficiently changed the law such that those precedents are no longer valid.

In Docket No. 38792, *Switching Charges For Privately-Owned Cars Billed to Repair Facilities*, served October 18, 1982, Commissioner Frederic N. Andre observed: ". . . . . *Indiana Harbor* was bad law and bad policy and should ultimately be overturned. . . . . [A]lthough the Commission's decision in *Indiana Harbor* was affirmed on

appeal, the court's decision does not seem to tie the Commission's hands in the future". The Administrative Law Judge agrees with Commissioner Andre that the court's decision does not preclude the Commission from re-examining its previous ruling and deems now to be an appropriate time to do so.

Environmental matters are not at issue.

Contentions of the complainants as to fact or law not specifically discussed hereinabove have been given due consideration and are found to be either not materially significant or not justified.

It is found and concluded that the complainants have not sustained their burden of proof, and that the service of switching empty private cars to and from facilities for repair is a "distinct rail service" within the meaning of 49 U.S.C. § 10728(a) for which a separate charge may be lawfully collected; and that the collection of a separate charge by the defendants for the service of moving empty cars to and from repair facilities is a reasonable practice under 49 U.S. §§ 10701(a) and 1121(a). The complaint is ordered dismissed and complainants' petition for reparation is denied. The proceeding is ordered discontinued.

By the Commission,

/s/ William A. Shue
WILLIAM A. SHUE
Administrative Law Judge

[SEAL]

JAMES H. BAYNE
Acting Secretary

APPENDIX H

INTERSTATE COMMERCE COMMISSION DECISION

No. 39380

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*
v.
BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, *et al.*

Decided: June 1, 1984

General American Transportation Corporation (GATC), Union Tank Car Company (UTCC), and North American Car Corporation (NACC), complainants, have appealed from the initial decision of the Administrative Law Judge dismissing their complaint for reparations and other relief. Defendants Baltimore and Ohio Chicago Terminal Railroad Company (BOCT) and Indiana Harbor Belt Railroad Company (IHB) replied. Because our conclusions differ from those of the Administrative Law Judge, the appeals will be granted.

BACKGROUND

Rail carriers making use of privately-owned cars to meet their common carrier obligations compensate the car owners on a loaded mileage basis. The mileage tariff contains an equalization rule which compensates carriers for excess empty mileage transporting private tank cars.

IHB and BOCT are intermediate switching carriers operating in the Chicago, IL, switching district. Essentially their operations consist of switching loaded and empty cars between various line haul carriers, and to and from their on-line industries and privately-owned on-line car repair facilities.

Both BOCT and IHB participated in Items 190-Series and 615-Series of Mileage Tariff ICC PHJ-6007H providing for empty movement of privately-owned cars without charge to and from privately-owned facilities for repairs.[1] Effective February 11, 1983, both carriers filed tariff supplements excluding themselves from items 190 and 615 unless the empty movement immediately preceded or followed a loaded revenue movement in which they participated. Each established switching charges for the excluded movements, and IHB excluded itself from the tank car equalization rule of the mileage tariff.

Between 1978 and 1982, IHB made 116,610 empty moves to or from repair facilities. It recovered $96,263[2] from operation of the equalization rule. It alleges that a compensatory recovery would have been $856,452. BOCT kept no records of free repair moves before filing its tariff, but estimates that on average 33 cars a day moved free.

Complainants unsuccessfully protested the tariff adjustments and then filed the instant complaint, alleging that the collection of charges by BOCT and IHB for switching empty cars to and from facilities for repair and other services is an unreasonable practice in violation of 49 U.S.C. 10701(a) and 11121(a)(1). It is undisputed that defendants derive substantial economic benefit from

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[1] Also cleaning, lining, relining, maintenance, and modification.

[2] The figure includes an estimate for 1982.

the movement of private cars over their lines.[3] Accordingly, complainants argue, empty cars moving for routine repair move not as freight but as instrumentalities of transportation and, since the service provided is not a "distinct rail service," the collection of a separate rate or charge is unreasonable and unlawful. Finally, complainants allege that IHB's excluding itself from the tank car equalization rule violates an outstanding order of the Commission. Complainants seek a cease and desist order and reparations.

The Administrative Law Judge concluded (1) that complainants had not sustained their burden of proof, (2) that the service of switching empty private cars to and from facilities for repair is a distinct rail service for which a separate charge may be lawfully collected, and (3) that the collection of the separate charge by defendants is a reasonable practice.

On appeal, complainants argue that these three conclusions are in error, and that the Administrative Law Judge further erred in failing to find that IHB is in violation of an outstanding order of the Commission.

DISCUSSION AND CONCLUSIONS

In *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102 (1977), *aff'd sub nom. Ind. Harbor Belt R. Co.* v. *General Am. Transp.*, 577 F.2d 394 (7th Cir., 1978) (*Indiana Harbor*), the Commission reviewed and reconciled all of its major cases concerned with the imposition of separate charges for the empty movement of privately-owned cars. It concluded that, as a matter of

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[3] Complainants, in their opening verified statements, showed the following total revenue miles during 1980, 1981, and 1982:

		BOCT	IHB
Cars owned by	GATC	670,645	280,969
" " "	NACC	207,004	203,363
" " "	UTCC	316,615	199,686

law, the switching of empty privately-owned cars for repair is not a distinct rail service because loaded movement would be impossible without the performance of ordinary repairs, and repair movements are therefore "necessary to the movement of freight."[4] 357 I.C.C. at 129. No exception was recognized.

Consistent with *Indiana Harbor*, a carrier may assess a charge for switching empty private cars for repairs only where these cars move as property and not as instrumentalities of transportation. *Id.* at 123. The determination of whether a car is moving as an instrumentality of transportation or private property depends upon whether there is an economic benefit to the transporting carrier. *Ibid.* An economic benefit may be either direct or indirect. A direct benefit may result from immediately prior or subsequent revenue line-haul or switching movement. Indirect benefit results when the carrier makes more than a *de minimis* use of private cars to fulfill its common carrier obligations. *Id.* at 126-127.

A carrier that benefits from use of the national car fleet may not impose a charge for repair moves. Rather, it must derive its compensation for repair movements from (1) an equalization rule of national application, and (2) a cost element factored into its freight rates on loaded movements. To prove unlawful a carrier charge for the empty movement of privately-owned cars for repair, the burden is on a complainant to show both (1) that the rail carrier providing the service derives more than *de minimis* revenue from the loaded movement of private cars

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[4] In Ex Parte No. 331, *Expeditious Procedures for Permitting Publication of Separate Rates for Distinct Rail Services*, 355 I.C.C. 684 (1977), the Commission defined distinct rail services as "those railroad transportation services, which are separate from line-haul transportation services necessary for the movement of freight, and for which a specific tariff item is published by the railroads either upon their own initiative or upon the request of any shipper or receiver of freight." Id. at 696.

over its line[5] (benefits or instrumentalities of transportation test), and (2) that the repairs in question are necessary to the rail car movement of freight (distinct rail service test).

Defendants may demonstrate the lawfulness of their charges by showing an absence of economic benefit or that the service provided is in fact a distinct rail service. In No. 36116, *Charges for Movement of Empty Cars, East Camden and Highland Railroad Company* (EC&H), embraced within *Indiana Harbor*, the Commission recognized that where a carrier derives no revenue from loaded movements of privately-owned cars, empty repair mileage will not be compensated by freight rates. 375 I.C.C. at 131. The EC&H was permitted to publish charges for empty repair switches as an alternative to participating in a nationwide equalization rule.

In No. 38646, *Inland Steel Company* v. *Illinois Central Gulf Railroad Company* (not printed), served May 24, 1982, the indirect benefit test of *Indiana Harbor* was defeated by a showing that privately-owned cars dedicated to unit train service were not part of the national car fleet and that the negotiated tariff under which they moved in revenue service superseded the mileage allowance and required less from the carrier than its usual common carrier obligation. The decision suggested but did not find that round-trip movements of 86 and 100 miles to facilities off the route of line-haul movement could be considered a distinct rail service. Similarly, in No. 38792, *Switching Charge for Privately-Owned Cars Billed to Repair Facilities* (not printed), served October 18, 1982, *aff'd in part sub nom.* No. 82-3017, *Evans Products Co. et al.* v. *I.C.C. et al.*, —— F.2d —— (7th Cir. 1984), a terminal switching carrier not participating in the mileage tariff was found not to receive sufficient in-

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[5] As an alternative, complainants may show a direct benefit from immediately prior or subsequent revenue movement.

direct benefit from the movement of private cars to warrant considering empty cars as instrumentalities of transportation when being switched by it to repair shops.

Complainants have met the burden of proof established in *Indiana Harbor*. They have shown that defendants' use of privately-owned cars in revenue service (fn. 3, *supra*) was sufficient to meet the indirect benefit test. *Indiana Harbor* establishes a presumption that switching of empty private cars for repairs is not a distinct rail service. Complainants met the second part of their burden by relying on the presumption.

Notwithstanding the substantial revenues they receive from the movement of loaded private cars, defendants contend that they receive no indirect benefit because (1) they pay a mileage alowance to the car owners for the loaded movement, (2) the payments they receive under the equalization rule are not compensatory, and (3) as switching carriers, they do not participate in line haul revenues but are limited (except in the case of cross-town tariff switches) to a switching allowance which is absorbed by the line haul carriers. The allowance assertedly does not include the cost of empty repair switches, and the switching carriers cannot add this cost to the allowance.

We note initially that defendants' arguments regarding the benefit test are not properly before us since the Administrative Law Judge pretermitted the issue and complainants did not raise the omission in their appeal. We note in any event that IHB raised the switching allowance issue in *Indiana Harbor*, *supra*, at 114 and that defendants' arguments do not address the principal rationale for the benefit test: that the benefit arises out of the use of private cars to fulfill the common carrier obligation.

Defendants, in an attempt to bolster the Administrative Law Judge's finding of distinct rail service, advocate two

additional theories. Acknowledging that there has been no change in 49 U.S.C. 10728 since *Indiana Harbor*, they nonetheless point out that section 10701a, added by the Staggers Rail Act of 1980, permits rail carriers to establish for the transportation or service they provide, any rate that is not otherwise prohibited by Title 49, and establishes standards for minimum rate reasonableness. They argue that the free, empty movements for repair violate section 10701a and section 11121(a) relating to adequate compensation for car service. Defendants are mistaken. The cited statutory provisions apply only to transportation, as defined in 49 U.S.C. 10102(24), or to distinct rail services. The empty repair movements at issue here are neither.

Furthermore, section 10701a relates to the reasonableness of rates, not of practices. Commission actions under *Indiana Harbor* do not purport to limit the level of the rates defendants may charge. Rather, they look at the reasonableness of the practice of imposing a separate charge, regardless of the effect on rate levels. Thus, a finding that a charge for the movement of empty cars for repair violates 49 U.S.C. 10701 or 11121a is not contrary to the limitation of 49 U.S.C. 10707a(h). *See* H.R. Rep. No. 96-1430, 96th Cong., 2nd Sess. 96 (1980).

Finally, defendants argue that, unlike the charges disallowed in *Indiana Harbor*, their present tariffs distinguish between independent switch moves for repair and those integrated with a revenue movement. Assertedly, integrated repair moves are not a distinct rail service because they are made during a return or initial empty move of the car and are therefore arguably part of the line haul transportation service. Independent moves, on the other hand assertedly are a distinct rail service since they do not relate to a revenue movement. The distinction, they assert, was not considered by the Commission in *Indiana Harbor*. We disagree.

IHB argued for the same rule in *Indiana Harbor*. 357 I.C.C. at 113-114. The argument is no stronger now than it was then, because defendants still misapprehend the reason for the Commission's finding that empty repair switches are not distinct rail services. Starting with the definition of distinct rail service in Ex Parte No. 331 (fn. 4, *supra*), the Commission found that "[s]ince repair movements are necessary to the movement of freight in all revenue service, switching for repairs cannot be considered a distinct rail service whether performed by a line haul or switching carrier." 357 I.C.C. at 129. A showing that the switch is separate from the line haul is not enough. The purported distinction between independent and integrated moves does not address the "necessary to the movement of freight" part of the test. Defendants' other arguments regarding the historical view of switching and comparing it to such distinct services as weighing, storage, loading, and unloading likewise miss the mark because such views are limited to revenue service. Finally, no extraordinary circumstances comparable to those present in *Inland Steel* are found here.

We conclude that this case is governed by the Commission's decision in *Indiana Harbor*. We also note that in *Indiana Harbor*, IHB was ordered to participate in the tank car equalization rule. 357 I.C.C. at 130. IHB's tariff action cancelling its participation in the equalization rule violates this outstanding order of the Commission, since tariff relief has neither been sought nor granted.

We find:

The collection of charges by defendants for switching of empty privately-owned cars to facilities for cleaning, lining, relining, maintenance, modification or repairs, except to the extent otherwise authorized by the Commission, is an unreasonable practice in violation of 49 U.S.C. 10701(a) and 11121(a)(1).

This decision will not affect the quality of the human environment or energy conservation.

It is ordered:

1. Defendants Indiana Harbor Belt Railway Company and Baltimore and Ohio Chicago Terminal Railroad Company shall cancel the assailed tariff schedules on or before 30 days from the service date of this decision, upon not less than 1 days' notice to the Commission and the public by filing and posting in the manner prescribed by the Interstate Commerce Act.

2. Indiana Harbor Belt Railway Company is required to participate in the equalization rule set forth in Item 187 of Mileage Tariff ICC PHJ 6007H.

3. Ascertainment of damages to complainants shall await filing of a statement showing details of such damages pursuant to 49 C.F.R. 1133.2.

4. This decision is effective on the date of service.

By the Commission, the Review Board, Members Carleton, Fortier, and Dowell.

[SEAL]

JAMES H. BAYNE
Secretary

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-206

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 28, 1989.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 13th day of September, 1989.

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT RAILROADS AND ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

In a 1977 rate case, the Interstate Commerce Commission ("Commission") held that a railroad could not levy a direct charge for transporting privately owned rail cars to and from repair facilities if it derived more than *de minimis* revenue from loaded movements of such cars. In a 1987 rate case, based upon new evidence, the Commission found that this regulatory approach had created tremendous inefficiency and had denied many railroads adequate compensation for their services. After reexamining the statutory provisions previously in effect and considering remedial legislation enacted in 1980, the Commission concluded that the Indiana Harbor Belt Railroad Company ("IHB") and The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT") had lawfully established separate rates for this service. The Commission's decision was unanimously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The questions presented here are:

1. Was the Commission barred from reexamining its 1977 decision because the 1980 legislation did not expressly address the right of a railroad to charge for moving privately owned cars to repair facilities?
2. Was the decision below in conflict with a prior decision of the Seventh Circuit?
3. Did the Commission abuse its discretion in upholding the rates established by IHB and BOCT without guaranteeing that the car owners would fully recover any costs incurred as a result of these charges?
4. Having determined that the rail carriers had lawfully established separate rates for this service, did the Commission err in finding that the complainants were not entitled to an award of damages?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-688

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT RAILROADS AND ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION

The Indiana Harbor Belt Railroad Company ("IHB"), The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT"), and the Association of American Railroads ("AAR"), intervenors in the court of appeals below, submit this brief in opposition to the petition for a writ of certiorari filed by General American Transportation Corporation and its supporters ("petitioners" or "car owners").[1]

STATEMENT

A. *The Applicable Statutes.* In the aftermath of the Penn Central bankruptcy and the collapse of nine other railroads, Congress passed a series of remedial acts, in-

[1] Appendix A lists the individual members of the AAR and provides the information required under Rule 28.1.

cluding the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31, to enhance the financial viability of the nation's railroads. One of the key objectives of the 4R Act was to establish "less restrictive rate regulation."[2] Section 202(d) of the Act expressly authorized rail carriers to establish "separate rates for distinct rail services." 49 U.S.C. § 10728(a).[3] This provision was intended to "encourage competition," "promote increased reinvestment by rail carriers," and spur pricing "in accordance with the cash-outlay incurred by the carrier and the demand" for service. *Id.* §§ 10728(a)(1), (2) and (b)(1).[4]

Despite the enactment of the 4R Act, the financial troubles of the railroad industry continued. Large government subsidies remained necessary to maintain rail service in the Northeast,[5] and two major railroads became insolvent.

Faced with this continuing crisis, Congress once again found it necessary to revise the Interstate Commerce Act to mandate greater attention to the railroads' revenue needs. In enacting the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress found that, without improved earnings, railroads would suffer a capital shortfall of 16 to 20 billion dollars by 1985, with disastrous

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[2] S. Rep. No. 499, 94th Cong., 1st Sess. 11 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 25.

[3] In accordance with Rule 34.1(f), the full text of the pertinent statutory provisions is set forth in Appendix B.

[4] In 1978, the Interstate Commerce Act was recodified, but this was entirely non-substantive. *See* Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978); *Connecticut Trust For Historic Preservation v. ICC*, 841 F.2d 479, 483 (2d Cir. 1988).

[5] *See Conrail Reauthorization: Hearings Before the Subcomm. On Surface Transp. Of The Comm. On Commerce, Science and Transp.*, 97th Cong., 1st Sess. 13 (1981) (statement of the Hon. Robert W. Blanchette, Administrator, Federal Railroad Administration).

effects on the nation's freight transport system. *Id.*, section 2, 94 Stat. 1896. Congress therefore declared that it was its "overall purpose . . . to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110.

Congress recognized that "the benefits of the 4R Act" had been "less than anticipated." S. Rep. No. 470, 96th Cong., 1st Sess. 16 (1979). Many of the new "rate provisions (that is, peak period pricing and separate rates for distinct rail services) ha[d] been little used." *Id.* The Staggers Act was therefore "intended to simplify rate regulation" and to provide additional "pricing freedom" for the railroads. *Id.* 16-17; *see generally ICC v. Texas*, 479 U.S. 450, 460 (1987).

The Staggers Act mandated that, "to the maximum extent possible, competition and the demand for services [should] establish reasonable rates for transportation by rail . . . ." 49 U.S.C. § 10101a(1). The Act also sharply reduced the extent to which carriers could set rates collectively, 49 U.S.C. § 10706, and authorized individual railroads to "establish *any* rate for transportation or other service," unless that rate was unreasonably high or unreasonably low. 49 U.S.C. § 10701a(a) (emphasis added). In addition, the Act placed strict limits on the Commission's "unreasonable practice" jurisdiction. The Commission's authority to "determine and prescribe" reasonable practices could "not be used, directly or indirectly, to limit the rates which rail carriers are otherwise authorized to establish . . . ." 49 U.S.C. § 10707a(h).

Congress recognized that services that do not generate a sufficient rate of return should not be subsidized by rates on services provided to other (more demand-

inelastic) shippers. 49 U.S.C. § 10101a(10). Railroads were prohibited from establishing rates that do not contribute to "going concern value," 49 U.S.C. § 10701a(c)(1)-(2), and in individual rate cases, shippers were authorized to submit evidence addressing the question whether a carrier's rates cross-subsidized other shippers. 49 U.S.C. § 10707a(e)(2)(C).

B. *The Use Of Privately Owned Cars.* Railroads have always been the principal source of rail cars for the shipping public. Despite inadequate earnings, rail carriers have continued to invest in freight cars to satisfy their common carrier obligation.[6]

In meeting that obligation, however, "[r]ailroads are not expected to acquire equipment that cannot be economically justified by the traffic available."[7] Demand for rail service has always been highly cyclical, and it has long been recognized that "it would be a questionable use of limited railroad capital for the carriers to acquire all of the equipment needed to handle the periodic peak traffic when those cars would otherwise sit idle."[8] During peak traffic periods, railroads must provide freight cars for their shippers, but they are not required to supply cars immediately.[9]

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[6] J.A. 831-832; *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C.2d 966 (1987).

[7] *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.*, 4 I.C.C.2d 1, 15 (1987) ("*LOSAC*"), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 2429 (1989); *see also* 49 U.S.C. § 11121(a)(1)(B).

[8] *Allied Corp. v. Union Pac. R.R.*, 1 I.C.C.2d 480, 484, *aff'd sub nom. Allied Corp. v. United States*, 779 F.2d 41 (3d Cir. 1985); *see also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981).

[9] *Allied Corp.*, 1 I.C.C.2d at 484. In addition, railroads must provide "suitable cars," but are not required to supply highly specialized cars. *Id.* at 483.

In order to avoid these delays and obtain other competitive advantages, a shipper may lease or purchase its own cars. Typically, these cars are used exclusively by that shipper, and they may even be dedicated to a particular route or service. J.A. 924-927.

Railroads compensate private car owners for the use of their cars in several ways. In some instances, compensation is provided in the form of "allowance" payments. Allowance formulas are tied to market factors and to the private car owners' costs of owning and maintaining their cars.[10] When allowance payments are not made (and sometimes even when they are made), shippers receive compensation in other forms, including lower freight rates.[11] The railroad may establish a "dual" rate scale, effectively providing a discount for loaded movements in privately owned cars.

Private car owners are responsible for routine maintenance—so-called "ordinary repairs"—of their cars. Their repair costs typically are factored into the existing allowance formulas, when such formulas exist, and are inevitably reflected in market-based compensation when they do not. Most car owners arrange for such repairs at privately owned repair facilities; there are more than

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[10] In 1985, the AAR reached agreement with tank car owners on a new allowance formula. *See Investigation Of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Since 1983, all new covered hopper allowances have been set by individual railroads, often after negotiations with shippers. Many grain hauling railroads have placed limits (which car owners call "allowance caps") on the allowances paid on particular movements, reflecting the reduced economic value of surplus grain cars. The savings have been passed on directly to grain shippers in the form of huge freight rate reductions. *LOSAC*, 4 I.C.C.2d at 1-20.

[11] *See LOSAC*, 4 I.C.C.2d at 17; *Natural Gas Pipeline Co. v. New York Central R.R.*, 323 I.C.C. 75, 79 (1964); *Eastern Central Motor Carriers Ass'n, Inc. v. Baltimore & O. R.R.*, 314 I.C.C. 5 (1961), *aff'd sub nom. Cooper-Jarret, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo.), *aff'd per curiam*, 379 U.S. 6 (1964).

two hundred such facilities in the United States, many of which are owned by the car owners themselves. J.A. 834. The railroads serving these facilities must transport private cars to and from the chosen facilities for ordinary repairs at the car owner's direction. *Id.*; *see also* J.A. 945.

C. *Indiana Harbor I And The Proceedings Below.* In 1977, a division of the Commission held that a railroad may not levy a direct charge for transporting privately owned cars to and from repair facilities if it derives more than *de minimus* revenue from loaded movements of such cars. *General Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 357 I.C.C. 102, 126-27 (1977) ("*Indiana Harbor I*"), *aff'd*, *Indiana Harbor Belt R.R. v. General Am. Transp. Co.*, 577 F.2d 394 (7th Cir. 1978). The Commission proclaimed that "the costs of repair movements of privately owned cars must be treated as a common cost which must be shared by all carriers which derive revenue from the national private-car fleet." *Id.* at 127.

Approximately three years later, Congress enacted the Staggers Act, and many railroads began to establish separate rates for movements of privately owned cars to repair facilities. Car owners challenged some of these rates at the Commission but, beginning in 1982, the agency issued a series of decisions upholding separate charges.[12] In these cases, the Commission purported to distinguish *Indiana Harbor I*, but at least one Commis-

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[12] *See, e.g.*, Docket No. 38792, *Switching Charges For Privately-Owned Cars Billed To Repair Facilities* (decision served October 18, 1982) ("*CHTT Switching Charges*"), *aff'd in pertinent part, Evans Prods. Co. v. ICC*, 729 F.2d 1107 (7th Cir. 1984); Docket No. 39392, *PPG v. Akron & Barberton Belt R.R.*, (Review Board decision served June 28, 1984); Docket No. 38646, *Inland Steel Co. v. Illinois Central Gulf R.R.* (Review Board decision served May 24, 1982). A copy of each unpublished Commission decision cited herein has been lodged with the Court.

sioner openly declared that the agency's 1977 decision should be overturned.[13]

The IHB and BOCT switch large numbers of private cars each year to numerous repair facilities located on their lines, and their sporadic earnings under the "equalization" rule did not come close to covering their costs.[14] Shortly after the Commission had issued its decision upholding the separate rates established by the Chicago Heights Terminal Transfer Railroad Company ("CHTT"), IHB and BOCT independently published switching charges for movements of empty cars to repair facilities on their lines. These charges were applicable only to switching movements not immediately followed or preceded by a loaded movement on the lines of the IHB or BOCT, respectively.

Following standard Commission procedures for adjudicating complaints about individual railroad rates, sev-

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[13] In a 1982 concurring opinion, Commissioner Andre described the agency's 1977 ruling as "bad law and bad policy." *CHTT Switching Charges* at 10. He also emphasized that "sound policy requires that railroads be as free as possible to break separate components of a service out of the general rate structure and finance them by separate and distinct charges." *Id.* at 11. Only in this way could railroads "avoid the harmful results of cross-subsidization and rate averaging." *Id.*

[14] The equalization rule is described in the Commission's decision in *General Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599, 601 n.5 (1987) ("*Indiana Harbor II*"), Pet. 40a n.5. It was designed to provide a monetary incentive for more efficient management of private cars, and was never intended as a substitute for compensatory rates to repair facilities. J.A. 921-922; J.A. 945-946; J.A. 955-956.

Before the switching charges challenged in Docket No. 39380 became effective, BOCT had incurred variable costs of nearly $1 million per year in switching private cars into and out of repair facilities. Yet BOCT had received no revenue under the equalization rule since 1979. J.A. 335; J.A. 494. During the period 1978 to 1982, the IHB received $96,263 under the "equalization" rule, which covered only about 12 percent of its variable costs incurred in providing this service. J.A. 315.

eral private car owners petitioned for suspension and investigation of the IHB and BOCT tariffs.[15] Those petitions were denied, and in early 1983, the IHB and BOCT tariffs became effective.[16] The car owners then filed a formal complaint against these railroads' tariffs, seeking to have them cancelled as an unreasonable practice.

In the ensuing rate case, the evidence demonstrated that the approach adopted in *Indiana Harbor I* created a highly distorted pricing system. Two leading economists, Professors Willig and Kyle of Princeton University, explained that in a free-market economy, prices serve two basic purposes. First, prices enable providers of goods and services to recover their costs and remain in business. J.A. 901-903. Second, they guide the allocation of resources and thereby promote efficiency. *Id.*

Under *Indiana Harbor I*, neither pricing function was achieved. Carriers were required to transport privately owned cars to and from repair facilities, but generally were prohibited from imposing a separate charge for this service. The cost recovery function of pricing was frustrated because, while *Indiana Harbor I* assumed that carriers could allocate costs to loaded movements at will, many carriers were in fact unable to recover the costs

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[15] Under the Interstate Commerce Act, the lawfulness of a new tariff or tariff amendment may be challenged before its effective date by a petition for suspension and investigation (*see* 49 U.S.C. § 10707) or by complaint after the rate is in effect (49 U.S.C. § 11701(b)). Both approaches were taken by the car owners in this case.

[16] Division 1 of the Commission, acting as an Appellate Division, denied the car owners' appeals from the decisions of the Suspension Board refusing to suspend or investigate these new rates. *See* Suspension Case No. 70993, *Movement Of Empty Cars To/From Facilities For Cleaning, Etc.* (notice served February 10, 1983); Suspension Case No. 71025, *New Charges For Empty Car Movements, Baltimore And Ohio Chicago Terminal R.R.* (notice served March 22, 1983).

of this service in other rates.[17] As a result, many carriers were forced to subsidize this service, regardless of its effects on their overall revenues. J.A. 902-904, 906-910.

The second function of prices—promoting the efficient allocation of resources—was also frustrated by the holding in *Indiana Harbor I*. Private car owners received the benefits of this rail service, but did not directly bear the costs. As a result, they demanded and received a level of service which was, from an economic standpoint, excessive and inefficient. J.A. 910-912.[18]

In 1987, the Commission issued its decision upholding the rates established by IHB and BOCT. The Commission emphasized that the regulatory approach adopted in

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[17] J.A. 486; J.A. 1149-1156. There is no necessary relationship between the volume of private car repair traffic a particular railroad handles and the volume of loaded line-haul or switching traffic it handles. A railroad that moves a car to a repair facility does not necessarily carry loaded movements in that car or even in other cars of the same type. J.A. 492-494. Some carriers are geographically well placed to provide movements of private cars to repair facilities concentrated on their lines, but are poorly placed to secure a corresponding amount of loaded line-haul business in such cars. Others carry substantial loaded traffic in private cars but transport few of these cars to repair facilities.

From an economic standpoint, the transportation of private cars to and from repair facilities is a separate and distinct service. J.A. 906-907; J.A. 790-791. If the demand for a carrier's line-haul services is insufficient to allow recovery of both line-haul costs and the costs of repair movements, then the line-haul rates simply will not cover the costs of both services. J.A. 906-909.

[18] The regulatory scheme adopted in *Indiana Harbor I* produced many of the same results as a rule requiring landlords to provide all tenants with free electricity. Since tenants would not bear the costs of their electricity, they would have no incentive to consider those costs in setting their thermostats or making other decisions on energy consumption. And tenants who consumed more than average quantities of energy would effectively be cross-subsidized by tenants who conserved energy. *See* J.A. 903-905.

Indiana Harbor I was "in direct conflict with" the statutory provisions of "the 4R Act and the Staggers Act." *Indiana Harbor II*, 3 I.C.C. 2d at 611, Pet. 55a. The Commission recognized that as a result of its 1977 decision, "the costs of repair movements [had] unfairly been placed on certain railroads who make a disproportionate number of repair moves." *Id.* at 604, Pet. 46a.[19] The only solution that was both lawful and efficient was to allow carriers to establish separate charges "for hauling empty, privately owned cars to and from repair facilities." *Id.* at 599, 613-14, Pet. 38a, 59a. These charges could then "be included in the computation of mileage allowances that the railroads pay the shippers." *Id.* at 599, 613-16, Pet. 38a, 59a-63a. The Commission also emphasized that its prior approach had arisen "in an era when rate averaging and cross subsidy were commonplace." *Id.* at 607, Pet. 49a-50a. The 4R and Staggers Acts, however, were intended to curtail cross-subsidies and "collective" action. *Id.* at 601-602, 607, Pet. 41a-42a, 49a-51a.

On February 29, 1988, the Commission unanimously denied a petition for reconsideration. Docket No. 35404, *General Am. Transp. Corp. v. Indiana Harbor Belt R.R.* (decision served February 29, 1988) ("*Indiana Harbor III*"), Pet. 69a-78a. The Railway Progress Institute ("RPI") had argued that the Commission's new approach was unlawful because it would result in car owners "bear[ing] at least some of the cost of repair moves." *Id.* at 2, Pet. 71a. The Commission squarely rejected this claim, stating:

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[19] The Commission found that, "[f]rom 1978 through 1982, IHB switched 5,805 cars to repair shops and the same number from those facilities." *Indiana Harbor II*, 3 I.C.C.2d at 604, Pet. 46a. "If switching charges had applied, its revenues would have been approximately $856,452." *Id.* "However, during this period its recovery under the tank car equalization rule was only $96,263." *Id.*

> The railroads' obligation to compensate car owners for costs of ownership including repair movements still exists, but the most plausible statutory basis for discharging that obligation within the regulatory framework of published rates is section 11122, which governs private car compensation generally. That section, as we discussed in *Indiana Harbor II*, requires that private car compensation reflect not only costs of ownership, but the sometimes conflicting considerations of the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars. [Citation omitted.] Thus, it does not guarantee that individual car owners will receive their overall costs of ownership, let alone dollar for dollar reimbursement of one specific element of ownership costs: repair moves. [Citations omitted].

Id., Pet. 71a-72a.

RPI had also argued that the Commission was precluded from changing its approach because shippers and car owners had relied upon *Indiana Harbor I* in negotiating rate contracts and car leasing agreements. In rejecting this argument, the Commission emphasized that "voluntary private contracts cannot bind Congress or this Commission to maintenance of the regulatory status quo." *Indiana Harbor III* at 2, Pet. 72a. The Commission found "RPI's position here particularly unpersuasive inasmuch as it had sufficient notice of the fact that *IHB I* was becoming increasingly out of step with the prevailing regulatory and industry environments." *Id.* at 3, Pet. 73a. "Post *IHB I* decisions began clearly to regard *IHB I* as 'bad law and policy' signaling that a change was imminent." *Id.* "Private car owners therefore had sufficient notice that the regulatory environment was in transition." *Id.* Accordingly, the Commission found that RPI had "failed to establish material error or any other grounds for reopening this proceeding." *Id.* at 5, Pet. 78a.

The United States Court of Appeals for the District of Columbia Circuit unanimously upheld the Commission's decision and denied the car owners' petition for rehearing and suggestion for rehearing *en banc*. *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir.), *reh'g denied*, 883 F.2d 1029 (D.C. Cir. 1989), Pet. 1a-34a.

ARGUMENT

The fundamental issue presented here is whether the Commission and the court below properly determined that IHB and BOCT had lawfully established separate rates for moving privately owned cars to repair facilities. Both the Commission and the court held that the assessment of separate charges was permissible because the transportation of privately owned cars to and from repair facilities qualifies as a "distinct rail service" under section 10728. This issue has been committed by Congress to the agency's discretion, and there are no questions of statutory construction or conflicts among the courts of appeals that warrant review by this Court. The car owners seize upon the fact that the Commission followed a different approach in a 1977 rate case, and they argue that by failing to amend section 10728 three years later, Congress ratified the agency's prior decision. Congress' silence on this obscure rate issue, however, cannot properly be converted into a statutory compulsion to maintain the *status quo ante*. This is particularly true here, because as the Commission and the court emphasized, Congress in 1980 added new provisions designed to encourage independent pricing of distinct services, reduce inefficiency, eliminate non-compensatory rates, and ensure that railroads have a realistic opportunity to earn adequate revenues. *See* 49 U.S.C. §§ 10101a(1), (3), (10), (11), 10701a, 10704(a)(2), and 10707a(e)(2).

The car owners also claim that the decision below was "arbitrary and capricious" because it did not guarantee that car owners fully recover any costs they

incur as a result of IHB's and BOCT's separate charges for movements to repair facilities. Yet preexisting case law had established that car owners are no more entitled to a guarantee of full recovery of car ownership costs than are railroads. In addition, as the court of appeals explained, car owners will have the same opportunity to recover the costs of movements to repair facilities as they do to recover their other ownership costs.

Finally, the car owners allege that by failing to award damages, the Commission rescinded a prior "rule" "retroactively." Yet the Commission's prior decision on movements to repair facilities was never codified in a rule or regulation. It was issued in an adjudicatory rate case and could be reversed in a subsequent rate case such as this one. Moreover, since the car owners did not prove that any statutory violations occurred, they could not possibly have been entitled to an award of damages.

I. THE COURT OF APPEALS CORRECTLY HELD THAT, IN ENACTING THE STAGGERS ACT, CONGRESS DID NOT "RATIFY" THE COMMISSION'S PRIOR RATE DECISION

At this point, petitioners have abandoned any argument based on statutory language alone. This is not surprising, since the pertinent statutory provisions state only that a rail carrier *must* publish rates for "transportation" or "service," 49 U.S.C. § 10761(a), and that a carrier *may* "on its own initiative" establish "separate rates for distinct rail services," 49 U.S.C. § 10728(a).[20]

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[20] Separate rates are also authorized by section 10701a(a), which provides that a rail carrier "may establish *any* rate for transportation or other service," unless that rate is expressly prohibited by another statutory provision or is unreasonably high or unreasonably low. 49 U.S.C. § 10701a(a) (emphasis added); *Southwestern Millers' League v. Atchison, T. & S.F. Ry.*, 364 I.C.C. 724, 729 (1981).

While recognizing that the language of the statute does not directly support their position, petitioners claim that Congress "ratified" *Indiana Harbor I* when it enacted the Staggers Act without amending section 10728. Pet. at 11-16. There is nothing to this contention. Congress could not have placed its stamp of approval on the Commission's *Indiana Harbor I* ruling for the quite apparent reason that it never reenacted section 10728, the key statutory provision.[21] Congress did amend other provisions of the Act in 1980, but it left section 10728 untouched. As a result, petitioners can point to nothing in any congressional hearings, committee reports or floor debates that even mentions *Indiana Harbor I.*

Petitioners' argument thus rests on the untenable proposition that since Congress could have repudiated the Commission's decision, but did not, legislative approval must be inferred. The Court has long rejected such an approach to statutory interpretation. "Congress' silence is just that—silence . . . ." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The Court has therefore warned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." [22] Congress' failure to repudiate particular regulatory decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice.[23]

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[21] *Helvering v. Hallock*, 309 U.S. 106, 120-21 n.7 (1940); *Ward v. Commissioner*, 784 F.2d 1424, 1430 (9th Cir. 1986); *Fmali Herb, Inc. v. Heckler*, 715 F.2d 1385, 1387-88 n.1 (9th Cir. 1983).

[22] *Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also Rodriquez v. Compass Shipping Co.*, 451 U.S. 596, 614-17 (1981); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980); *Zuber v. Allen*, 396 U.S. 168, 185 & n.21 (1969); *Helvering v. Hallock*, 309 U.S. at 119-21 & n.7.

[23] *Zuber v. Allen*, 396 U.S. at 185-86 n.21; *see also McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677, 1681 n.8 (1988); *United States v. Price*, 361 U.S. 304, 310-11 (1960); *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir.), *cert. denied* 429 U.S. 890 (1976).

Even if Congress had reenacted the controlling statutory provision in this case, this alone—"particularly without the slightest affirmative indication that Congress ever had the [agency's] decision before it—is an unreliable indicium at best." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *see also SEC v. Sloan*, 436 U.S. 103, 121 (1978); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); N. Singer, *Sutherland On Statutory Construction* § 49.09 at 400 (4th ed. 1984).[24] The principle that petitioners rely upon "is no more than an aid in statutory construction."[25] While "useful at times in resolving statutory ambiguities, it does not mean that the prior construc-

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[24] The cases cited by petitioners do not support their claim that the reenactment "doctrine" has often been applied without evidence that Congress was aware of the prior administrative interpretation. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382, 384 n.74, 385 n.76, 387 (1982) ("review of the legislative history of the statute persuasively indicates that [the prior judicial interpretation] was indeed what Congress actually intended"; in fact, these judicial rulings were raised specifically in congressional hearings and Congress was found to have "evidenced an affirmative intent to preserve" that precedent); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983) (Congress was "acutely aware" of the prior agency rulings, yet failed to act on any of the thirteen bills introduced in a twelve-year period to overturn those rulings); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 534 (1982) ("Congress was made aware of the [agency's] interpretation"); *Haig v. Agee*, 453 U.S. 280, 299 (1981) (history of agency interpretation "was repeatedly communicated to Congress"); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (subject of agency ruling "plainly has not escaped public or legislative notice," citing Senate subcommittee hearings on issue); *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979) (legislative history of statute "rather plainly indicates that Congress intended" to adopt prior judicial interpretation); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("detailed knowledge" of judicial precedent exhibited by Congress).

[25] *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941); *see also Jones v. Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947).

tion has become so embedded in the law that only Congress can effect a change." [26]

The court below properly applied these principles. "Congress [had] revisited the Interstate Commerce Act on two occasions subsequent to *Indiana Harbor I*—in 1978 when it recodified the Act and in 1980 when it approved the Staggers Act." *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1053 (citations omitted), Pet. 9a-10a. "But [the court saw] no indication that Congress was either aware of or had approved the Commission's empty-repair-move policy when it recodified the 'distinct rail services' provision in 1978 or in 1980 when it amended other portions of the Act." *Id.* The court also emphasized that "the force of congressional silence is particularly weak in this case given the abundant evidence" that "Congress, in passing the Staggers Act, wanted to put an end to ratemaking practices involving railroad cross-subsidization and other inefficiencies." *Id.* at 1053 n.10, Pet. 10a n.10.[27]

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[26] *Id.*; *see also Commissioner v. P.G. Lake, Inc.*, 356 U.S. 260, 265-66 n.5 (1958); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 (1939); *McCoy v. United States*, 802 F.2d 762, 764-66 (4th Cir. 1986). As these cases indicate, even when an agency's prior interpretation is embodied in a regulation, the agency may subsequently change its approach. If a regulation has been promulgated, any change ordinarily must be implemented through use of the agency's rulemaking powers. In this case, however, the Commission never promulgated regulations specifically addressing movements to repair facilities. *See* pp. 21-25, *infra*.

[27] *See, e.g.*, 49 U.S.C. §§ 10101a(1), (3), (10); 10701a(c); 10707a(c), (e). The car owners now argue for the first time that Congress also ratified the Commission's ruling in *Union Tank Car Co.*, 268 I.C.C. 338 (1947). Yet *Union Tank Car* held only that railroads were not *required* to publish separate rates for this service; it did not address the question whether carriers could voluntarily establish separate charges. *Id.* at 342. In addition, when section 10728 was enacted in 1976, Congress was obviously attempting to increase the number of services for which separate charges could be imposed, not to codify the old Commission case law on this

In their determined effort to show that the decision below conflicts with the rulings of this Court, petitioners mistakenly rely "on the familiar notion that Congress is presumed to be aware of administrative interpretations of a statute or regulation when it adopts such language in a statute."[28] While "courts have stated this general proposition," usually "as a defense to a later attack against the same [agency] interpretation," the court of appeals has found "*no* case has rested on this presumption alone as a basis for holding that the statute required" a given interpretation.[29] Nor are the lower courts "in disarray" on this issue. A close reading of the cases indicates that an agency's prior construction is given weight in assessing Congress' intent only when there is at least some evidence that Congress was actually aware of the agency's prior interpretation.[30] Petitioners

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subject. *See, e.g.*, S. Rep. No. 499, 94th Cong., 1st Sess. 11 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 25 (a key objective of the 4R Act was to establish "[l]ess restrictive rate regulation").

[28] *AFL-CIO v. Brock*, 835 F.2d 912, 916 n.6 (D.C. Cir. 1987); Pet. at 12-14.

[29] *Id.* (emphasis in original), *citing inter alia Lindahl v. OPM*, 470 U.S. 768, 782-86 (1984) (evidence in legislative history that Congress was aware of particular interpretation); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 384-87 (same); *Lorillard v. Pons*, 434 U.S. at 581-85 (same). *See also* N. Singer, *Sutherland On Statutory Construction* § 49.09 at 400 (4th ed. 1984) (the "presumption" that Congress "knows and approves" prior constructions "does not apply where nothing indicates that the legislature has its attention directed to the administrative interpretation upon reenactment").

[30] *See, e.g., Osborn v. American Ass'n Of Retired Persons*, 660 F.2d 740, 746-47 (9th Cir. 1981) ("Congress was aware of [the agency's] interpretation of the Act, yet took no steps to change that interpretation when it reenacted the Act . . . [and] on the contrary, . . . expressed [a] feeling" supportive of the agency's ruling); *Demarest v. Manspeaker*, 884 F.2d 1343, 1346 (10th Cir. 1989) (express purpose of statutory revision supported prior ruling by agency and courts); *FMC Wyoming Corp. v. Hodel*, 816 F.2d

have never even alleged that Congress was aware of *Indiana Harbor I.*

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE SEVENTH CIRCUIT

Petitioners also claim that the decision below conflicts with the decision of the Seventh Circuit upholding *Indiana Harbor I.* Pet. at 16-18. This purported conflict, however, stems entirely from their misinterpretation of the Seventh Circuit's opinion.

That court never held that the statute compelled the Commission's prior approach. Its decision did not, as the court below stated, rest "on a construction of the Interstate Commerce Act, much less a finding of specific congressional intent." *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1053, Pet. 9a. The Seventh Circuit emphasized that its only "responsibility" was to decide "(1) whether the Commission has acted within the power delegated to it by law; (2) whether the Commission's decision is supported by facts or substantial evidence; (3) whether the order is based on specific findings of fact from the record; (4) whether the Commission's conclusions have a rational basis." *Indiana Harbor Belt R.R. v. General Am. Transp. Corp.*, 577 F.2d at 397. The Seventh Circuit simply held that in light of the limited evidence available in 1977, the Commission's determination in *Indiana Harbor I* was "rational" and within its "statutory powers." *Id.* at 397, 404.[31]

496, 501 n.11 (10th Cir. 1987) (Congress "was aware" of agency interpretation), *cert. denied*, 108 S. Ct. 772 (1988); *In re Dep't Of Energy Stripper Well Exemption Litigation*, 690 F.2d 1375, 1386, 1388 (Temp. Emer. Ct. App. 1982) ("obvious" from congressional debates that subsequent agency interpretation accorded with congressional intent), *cert. denied*, 459 U.S. 1127 (1983).

[31] The car owners also cite two other Seventh Circuit cases (Pet. at 9, 16-17), but in both cases, the Seventh Circuit distinguished

In any event, the Commission's ruling in this case, and the decision of the court of appeals sustaining it, took into account new evidence that the Commission's old approach was not operating efficiently or equitably. The Seventh Circuit had assumed, for example, that railroads such as the IHB would be adequately compensated for this service under the "equalization rule" (*Indiana Harbor Belt R.R. v. General Am. Transp. Corp.*, 577 F.2d at 402), but later evidence demonstrated that the revenue IHB received under the equalization rule covered only a small fraction of its costs. J.A. 315, 322; *see generally General Am. Transp. Corp. v. ICC*, 872 F.2d at 1055, Pet. 13a-14a.[32]

In addition, by the time the court below had issued its decision, Congress had made significant changes in the Interstate Commerce Act.[33] Since the decision of the court

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Indiana Harbor I and ruled that railroads could properly establish separate charges for movements to repair facilities. In addition, neither decision considered the impact of the Staggers Act on the old regulatory regime. *See Evans Prods. Co. v. ICC*, 729 F.2d 1107 (7th Cir. 1984) (a switching railroad could properly charge car owners for movements to repair facilities; the railroad, however, could not impose such charges on the facilities *receiving* these shipments); *Atchison, T. & S.F. Ry. v. Union Tank Car Co.*, 611 F.2d 1184 (7th Cir. 1979) (railroads could properly assess charges for transporting rail cars from the Mexican border to repair facilities in Kansas, Louisiana, and Illinois).

[32] In testimony before the Commission, two prominent economists also explained that the approach adopted in *Indiana Harbor I* led to inefficiency and overconsumption of rail services. Since car owners were not required to pay for this service, they had no incentive to consider transportation costs in selecting repair facilities. J.A. 910-913; *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1051, Pet. 7a.

[33] Under the newly established rail transportation policy, for example, the Commission was required to encourage demand-based pricing, eliminate non-compensatory rates, promote efficiency, and allow railroads a realistic opportunity to earn adequate revenues. *See* 49 U.S.C. § 10101a(1), (3), (10). By changing the rail transportation policy, the Staggers Act gave the Commission new guid-

of appeals was based in part on these new statutory provisions, the prior ruling of the Seventh Circuit had no precedential value.

III. THE COURT OF APPEALS CORRECTLY HELD THAT, IN UPHOLDING THE RATES ESTABLISHED BY IHB AND BOCT, THE COMMISSION WAS NOT REQUIRED TO GUARANTEE THAT THE CAR OWNERS WOULD FULLY RECOVER ANY COSTS INCURRED AS A RESULT OF THESE CHARGES

Petitioners do not seriously contest the findings of the Commission, sustained by the court of appeals, that promoting an efficient railroad rate structure and preventing cross-subsidization were central purposes of the Staggers Act. Instead, they argue that it was arbitrary and capricious for the Commission to further those purposes by treating the cost of moving empty cars to repair facilities just like all other costs of car ownership. Pet. at 18-21. Citing 49 U.S.C. § 11121(a)(1), they contend that under "historic common carrier doctrine" railroads must bear the full cost of owning and maintaining private cars, that the Staggers Act did not alter that obligation, and that the Commission erred in failing to guarantee that the allowances the car owners receive from the railroads will result in full recovery of the costs of movements to repair facilities. *Id.*

The short answer to this argument, as both the Commission and the court emphasized in their decisions below, is that neither the statute nor any "historic common carrier doctrine" require that private car owners be *guaranteed* full recovery of their ownership costs, and

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ance on the "administration and enforcement of all provisions of the Act," including section 10728. *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 87-88 (1957); *see also American Commercial Lines, Inc. v. Louisville & N. R.R.*, 392 U.S. 571, 581-86 (1968); *Coal Exporters Ass'n v. United States*, 745 F.2d 76, 94 n.22 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985).

there is no sound basis for treating empty-repair-move costs differently than other costs of ownership. *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1057, Pet. 18a-19a. Any issue of guaranteed recovery of ownership costs had previously been laid to rest in the *LOSAC* case. There, the Commission and the court of appeals emphatically rejected the car owners' argument that under 49 U.S.C. §§ 11121 and 11122 the allowance system must be completely insulated from market forces. *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.*, 4 I.C.C. 2d 1 (1987), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 2429 (1989).[34] The only cost recovery issue in the proceeding below was whether the system appropriate for ownership costs generally, as determined in *LOSAC*, was also appropriate for empty-repair-move costs. Nowhere do petitioners even suggest a reason why section 11121 should require a different result for empty-repair-move costs than for other costs of car ownership. Still less do they demonstrate that the decision of the Commission to treat them the same was arbitrary and capricious.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE COMMISSION WAS NOT REQUIRED TO AWARD DAMAGES TO THE PRIVATE CAR OWNERS

In the court below, petitioners argued that the Commission was required to award $3 million in damages to them either because (1) this was an adjudication, and retrospective application of the Commission's new policy

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[34] The *LOSAC* decision was consistent with earlier rulings of the Commission and the courts. *See, e.g., Consolidated Rail Corp. v. United States*, 619 F.2d 988, 996 (3d Cir. 1980) (in regulating car compensation, the Commission must weigh the non-cost factors listed in the second sentence of subsection 11122(b), including "factors affecting the adequacy of the national freight car supply"); *Investigation Of Tank Car Allowance System*, 3 I.C.C.2d 196, 201 (1986); *Zone Of Reasonableness For Car Hire Charges*, 364 I.C.C. 299, 305 (1980).

was inappropriate or (2) this was a rulemaking, and new rules may be applied only prospectively. Petitioners have now abandoned the first argument, effectively conceding that if the Commission proceeding was an adjudication, they are not entitled to an award of damages. They again insist, however, that this proceeding was "transform[ed]" into a rulemaking and that the Commission was therefore required to award damages. Pet. at 22, 25. They also argue that the decision below somehow "conflicts" with this Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468 (1988). Pet. at 21-22.

In the first place, their basic premise is wrong. The Commission did not act "retroactively." After passage of the Staggers Act, the agency issued a series of decisions upholding rates established by other rail carriers for movements to repair facilities. *Indiana Harbor I* became riddled with exceptions, and one Commissioner openly declared that the agency's 1977 ruling was "bad law and bad policy" that should be overturned. *CHTT Switching Charges* at 10-11. In 1983, in this new regulatory climate, IHB and BOCT independently published the rates at issue here. Following standard procedure in Commission rate cases, the car owners petitioned for suspension and investigation of these rates, but the Commission denied these petitions and the new rates became effective. A number of car owners then filed a formal complaint challenging these rates pursuant to 49 U.S.C. § 11701(b). In 1987, when the Commission finally issued its decision, it simply applied the current provisions of the Interstate Commerce Act and held that the challenged rates, which had been in effect for four years, were lawful. No aspect of the agency's decision was "retroactive."

Moreover, the Commission is authorized to award damages only if a carrier violates the Interstate Commerce Act. 49 U.S.C. §§ 10704(a)(1), 11701(a), 11705(b)(2). In this case, since the complainants failed to prove that

any statutory violations had occurred, the Commission was not authorized to award damages.[35]

Even if the agency had acted "retroactively" and even if the statute authorized the Commission to award damages in these circumstances, petitioners' argument would fail. Their fundamental assumption is that *Indiana Harbor I* established a "rule," which could be rescinded only prospectively and only in a subsequent rulemaking proceeding. Pet. at 22. Yet, as the court of appeals explained, *Indiana Harbor I* was an "adjudicatory proceeding," and when a policy is initially established by adjudication, "reversal by adjudication" is "particularly appropriate." *Chisholm v. FCC*, 538 F.2d at 365; *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1060, Pet. 24a.[36]

Claiming to have been "whipsaw[ed]," petitioners argue somewhat cryptically that the court of appeals treated this case as an adjudication for some purposes but "upheld the agency's change in position" by treating the case as a rulemaking proceeding. Pet. at 24. Nothing in the decision below, however, supports this argument. The court never deviated from its ruling that *Indiana Harbor II* was an adjudication; as the court explained, the case began as an adjudication "with the filing of a complaint" and "retained its fundamental adjudicatory character throughout." *General Am. Transp.*

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[35] Also, since the complainants offered no proof of actual injury, damages could not be awarded. *Parsons v. Chicago & N.W. Ry.*, 167 U.S. 447, 460 (1897); *see also Great Northern Ry. v. Sullivan*, 294 U.S. 458, 463 (1935). While the complainants paid the rates assessed by the IHB and BOCT, they were at least partially reimbursed by the railroads under the existing car compensation systems. J.A. 1252 n.13.

[36] "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969); *see also Bowen*, 109 S. Ct. at 479 (Scalia, J., concurring) (where there is no pre-existing rule, "it is obviously available to the agency to 'make' law retroactively through adjudication").

Corp. v. ICC, 883 F.2d at 1030, Pet. 30a.[37] In any event, as petitioners suggest, it is only in an adjudication that an agency may determine past "rights and liabilities."[38] On the damages issue, the sole question was whether rates in effect *in the past* were lawful; as petitioners admit, this question could be resolved only in an adjudicatory proceeding.

The court below correctly recognized that the Commission did not treat this as a rulemaking proceeding and did not issue regulations.[39] The agency's decision to supplement the record by requesting public comment on issues having industry-wide significance did not change the nature of this proceeding.[40] Even if public

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[37] Petitioners claim to have been prejudiced by the Commission's reliance upon comments providing "legislative facts." Pet. at 23. Yet just as litigants in the Supreme Court may submit "Brandeis briefs" (*Muller v. Oregon*, 208 U.S. 412, 421 (1908); *Brown v. Board of Educ.*, 347 U.S. 483 (1954)), participants in adjudicatory proceedings before the Commission may provide information on the broader implications of Commission rulings. Furthermore, the critical evidence in this case specifically addressed the plight of the two individual railroads, the IHB and BOCT. The evidence showed that these railroads could price their services efficiently and obtain adequate compensation only by establishing separate rates for movements to repair facilities.

[38] Attorney General's Manual On The Administrative Procedure Act (1947) at 14, *quoted in Bowen*, 109 S. Ct. at 477 (Scalia, J., concurring); *see also* Pet. at 24.

[39] Although the Commission cited 5 U.S.C. § 553 in reopening the record, its 1984 notice in the Federal Register was not a notice of proposed rulemaking. It was captioned "Reopening; Possible Modification or Revocation of Case Law," and it expressly invoked the statutory provision governing reopening and reconsideration of prior Commission decisions. 49 *Fed. Reg.* 39,740 (October 10, 1984), *citing* 49 U.S.C. § 10327(g)(1).

[40] The car owners have never cited any "authority for their theory that an adjudication is converted into a rulemaking solely because an agency solicits and entertains the comments of those who have an interest in prospective application of the principle under study, and [the court below] found none." *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1060, Pet. 25a.

comment had never been sought, the Commission would have been required to consider the allegations made in the complaint and decide whether the rates imposed by the IHB and BOCT were lawful.

Contrary to petitioners' argument, the decision below does not in any way conflict with this Court's *Bowen* decision. The only issue in *Bowen* was whether the Department of Health and Human Services ("HHS") was authorized to promulgate retroactive Medicare regulations. The Court held that since the Medicare Act did not expressly grant such authority, the regulations at issue were invalid. *Bowen* has no relevance here. Unlike HHS, the Commission did not conduct a rulemaking proceeding and did not issue regulations of any kind.

Nor does Justice Scalia's concurring opinion support petitioners. His opinion, like the lower court's opinion in *Bowen*,[41] stated that apart from the provisions of the Medicare Act, retroactive rulemaking is disfavored or prohibited under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706. Justice Scalia's concurring opinion in *Bowen* is no more pertinent than the Court's decision itself. As explained above, the Commission never issued regulations; it simply decided this individual rate case.[42]

Petitioners also claim that the decision below conflicts with the Ninth Circuit's decision in *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). They did not rely upon *Ford Motor Co.* in the court below and for good reason. Unlike the automobile companies in that case, which were targeted

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[41] *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 760 (D.C. Cir. 1987), *aff'd*, 109 S.Ct. 468 (1988).

[42] Petitioners quote Justice Scalia's opinion out of context and imply that he has condemned the use of adjudicatory proceedings to establish policy. Pet. at 22-24. His opinion actually suggests just the opposite. *See Bowen*, 109 S. Ct. at 476-78, *citing inter alia SEC v. Chenery Corp.*, 332 U.S. 194 (1947) and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

as respondents in an adjudicatory proceeding initiated by a federal agency, petitioners themselves initiated this proceeding by filing a formal complaint against two individual railroads. Having forced the Commission to address these issues in an adjudicatory proceeding, petitioners are in no position to attack the Commission for failing to conduct a rulemaking,[43] and the alleged "conflict" is illusory.[44]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[43] *See, e.g., Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984); *Wagner v. Taylor*, 836 F.2d 596, 599 (D.C. Cir. 1987).

[44] Petitioners also cite *Nueces County Navigation Dist. No. 1 v. ICC*, 674 F.2d 1055 (5th Cir.), *cert. denied*, 459 U.S. 1035 (1985). In that case, the Commission chose to invoke rulemaking procedures and was upheld on appeal. The Fifth Circuit never indicated, however, that the Commission would have been *prohibited* from using its adjudicatory powers. In fact, the court emphasized that "[t]he choice between rulemaking and adjudication 'is one that lies primarily in the informed discretion of the administrative agency.'" *Id.* at 1065, *quoting SEC v. Chenery Corp.*, 332 U.S. at 203.

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APPENDICES

APPENDIX A

1. The respondents submitting this brief are:

Association of American Railroads ("AAR")
Indiana Harbor Belt Railroad Company ("IHB")
The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT")

2. AAR is a trade association for the nation's railroads. Its membership includes most Class I railroads and numerous non-Class I railroads. Its members account for more than 90 percent of the freight revenues of all railroads in the United States. The AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. AAR's members include:

Full Membership:

Alton & Southern Railway
Atchison, Topeka & Santa Fe Railway Company, The
Bangor & Aroostook Railroad Company
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company
Cambria & Indiana Railroad Company
Canadian National Railway (Lines in U.S.)
Canadian Pacific Limited (Lines in U.S.)
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Consolidated Rail Corporation
CSX Transportation, Inc.
Denver & Rio Grande Western Railroad Company, The
Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company
Elgin, Joliet & Eastern Railway
Galveston, Houston & Henderson Railroad

Grand Trunk Western Railroad
Green Bay & Western Railroad Company
Houston Belt & Terminal Railway Company
Kansas City Southern Railway Company
Lake Terminal Railroad Company, The
Louisiana & Arkansas Railway Company
Manufacturers Railway Company
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
National Railroad Passenger Corporation
Norfolk & Western Railway Company
Peoria & Pekin Union Railway Company
Pittsburgh & Lake Erie Railroad Company
Prescott & Northwestern Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Texas Mexican Railway Company
Union Pacific Railroad Company
Union Railroad Company of Pittsburgh
Vermont Railway Incorporated
Winston-Salem Southbound Railway Company

Associate Members:

Alaska Railroad Corporation
Apalachicola Northern Railroad Company
Atlanta & St. Andrews Bay Railway Company
Belfast & Moosehead Lake Railroad Company
California Western Railroad
Central Western Railway Corporation
Centromen Puru Incorporated
Chicago, Central & Pacific Railroad Company
Chicago, Missouri & Western Railway

Chicago South Shore & South Bend Railroad
Chicago Rail Link
Cities Services Company Railroad
Colorado & Wyoming Railway Company
Dardanelle & Russellville Railroad Company
Delray Connecting Railroad Company
East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
French National Railroads
Fruit Growers Express Company
Genesee & Wyoming Railroad Company
Government of Canada
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company
Hamersely Iron Pty. Ltd. (Western Australia)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.
India, Gov't of: Ministry of Railways (India)
Japanese National Railway (Japan)
Lake Superior & Ishpeming Railroad Company
Lenawee County Railroad Company, Incorporated
Louisiana & Delta Railroad
Louisiana & North West Railroad Company
Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
MidSouth Rail Corporation
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company
New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation
Pacific Fruit Express Company
Paducah & Louisville Railway, Incorporated
Pickens Railroad Company—National Railway Utilization Corporation
Pittsburg & Shawmut Railroad Company

Port Authority of New York & New Jersey, The
Providence & Worcester Railroad Company
Public Transport Commission of New South Wales (Australia)
Roberval & Saguenay Railway Company (Canada)
San Diego & Imperial Valley Railroad Company
Sierra Railroad Company (California)
South African Railways (Republic of South Africa)
Southern Indiana Railway, Inc.
Taiwan Railway Administration (Republic of China)
Texas & Northern Railway Company
Triton Transportation, Inc.
Upper Merion & Plymouth Railroad Company
Victoria A Minas Railway (Brazil)
Wabush Lake Railway Ltd. (Canada)
Washington Terminal Company

Special Canadian and Mexican Members:

Canadian Lines (In Canada)
Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
VIA Rail Canada
White Pass & Yukon Corporation Ltd.

Mexican Lines (In Mexico)
Ferrocarril Chihuahua Al Pacifico
Ferrocarril Sonara-Baja California, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

3. The IHB is a common carrier operating in the Chicago area. Approximately 51 percent of its stock is owned by Consolidated Rail Corporation ("Conrail"), and

the remaining 49 percent is owned by Soo Line Railroad Company ("Soo").

Conrail has no parent company. The following subsidiaries or affiliates of Conrail have or may have outstanding securities in the hands of the public:

Akron & Barberton Belt Railroad Company
Albany Port Railroad Corporation
Belt Railway Company of Chicago, The
Calpro Company
Calumet Western Railway Company
Chicago & Western Indiana Railway Company
CG Projects, Inc.
CRR Industries, Inc.
CRR Investments, Inc.
CRR Properties, Inc.
Indiana Harbor Belt Railroad Company
Lakefront Dock & Railroad Terminal Company
Merchants Despatch Transportation Corporation
Monongahela Railway Company, The
Nicholas, Fayette & Greenbrier Railroad Company
Penn Central Communications Company
Pennsylvania Truck Lines, Inc.
Peoria & Pekin Union Railway Company
Peoria Midwest Transportation Corporation
Pittsburgh, Chartiers & Youghiogheny Railway Company
PD Land Services, Inc.
PTL Intermodal, Inc.
Railbox Company
Railgon Company
Railroad Association Insurance, Ltd.
St. Lawrence & Adirondack Railway Company
Trailer Train Company
Transportation Data Exchange, Inc.

Soo is a wholly owned subsidiary of Soo Line Corporation, 56 percent of whose stock is owned by Canadian

Pacific Limited. Related companies that are or may be publicly owned are:

All Systems Load-Lift Inc.
AMCA International Limited
AMCA Chimie et Plastiques, S.A.
Beachpoint Holdings Ltd.
BOMAG GMBH
Canada Maritime Limited
Canadian Pacific Forest Products Limited
Canadian Pacific Limited
Canadian Pacific Tanker Services, Inc.
Chicago, Terre Haute and Southeastern Railway Company
CPTel Holdings Inc.
Dominion Atlantic Railway Company, The
Dominion Bridge—DBS Inc.
Falt Towing Ltd.
Herring Marathon Group Inc.
Kingston and Pembroke Railway Company, The
Lake Champlain and St. Lawrence Junction Railway Company, The
Lake Erie and Northern Railway Company, The
Manitoba and North Western Railway Company of Canada
Marathon Aviation Terminals Limited
Massawippi Valley Railway Company
Mayo Forest Products Ltd.
Montreal and Atlantic Railway Company, The
NBIP Forest Products Inc.
Ontario and Quebec Railway Company
PanCanadian Petroleum Limited
Project 200 Properties Limited
REDCO International, Inc.
Soo Line Corporation
Polytec S.A.R.L.
St. Lawrence and Ottawa Railway Company, The
Toronto, Grey & Bruce Railway Company

4. The BOCT is wholly owned by CSX Transportation, Inc., which is a subsidiary of CSX Corporation. The following related companies are or may be publicly owned:

Allegheny and Western Railway Company
Baltimore and Cumberland Valley Rail Road Extension Company, The
Baltimore and Philadelphia Railroad Company, The
Baronial Transportation, Inc.
Central Rail Road Company of South Carolina, The
Cincinnati Inter-Terminal Railroad Company, The
Clearfield and Mahoning Railway Company
Cleveland Terminal and Valley Railroad Company
Country Wide Transport Services, Inc.
CSX Transportation
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Home Avenue Railroad Company, The
Mid Allegheny Corporation
Richmond, Fredericksburg and Potomac Railroad Company
Yukon Pacific Corporation

APPENDIX B

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

(Added Pub.L. 96-448, Title I, § 101(a), Oct. 14, 1980, 94 Stat. 1897.)

§ 10327. Commission action and appellate procedure in rail carrier proceedings

(a) This section applies to a matter before the Interstate Commerce Commission involving a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title. However, other sections of this subtitle related to

actions of the Commission in proceedings involving rail carriers supersede this section to the extent that they are inconsistent with the provisions of this section related to deadlines.

(b) A division, individual Commissioner, employee board, or employee delegated under section 10305 of this title to make an initial decision in a matter related to one of those rail carriers shall complete all evidentiary proceedings related to the matter by the 180th day after assignment of the matter. The initial decision shall be submitted to the Commission in writing. If evidence is submitted in writing or testimony is taken at a public hearing, the initial decision shall be submitted to the Commission in writing by the 120th day after completion of all evidentiary proceedings and shall include—

(1) specific findings of fact;

(2) specific and separate conclusions of law;

(3) an order; and

(4) justification of the findings of fact, conclusion of law, and order.

(c) The Commission, or a division designated by the Commission, may void the requirement of an initial decision under subsection (b) of this section and may require the matter to be considered by the Commission or that division on finding that the matter involves a question of Commission policy, a new or novel issue of law, or an issue of general transportation importance, or that it is required for the timely execution of its functions.

(d) In a proceeding under this section, after the parties have had at least an opportunity to submit evidence in written form, the Commission shall give them an opportunity for briefs, written statements, or conferences of the parties. A conference of the parties must be chaired by a division, an individual Commissioner, an employee board, an employee delegated to act under section

10305 of this title, or an employee designated by the Commission.

(e) Copies of an initial decision under subsection (b) of this section shall be served on the interested parties. An initial decision becomes an action of the Commission on the 20th day after it is served on the interested parties, unless—

(1) an interested party files an appeal during the 20-day period, or by the end of an additional period of not more than 20 days, if authorized by the Commission or division designated by the Commission; or

(2) the Commission stays or postpones the initial decision under subsection (g)(2) or (j) of this section within the period or additional period referred to in clause (1) of this subsection.

(f)(1) Before an initial decision becomes an action of the Commission, the Commission, or a division or board designated by the Commission, may review the initial decision on its own initiative, and shall review an initial decision if an appeal is filed under subsection (e)(1) of this section. However, a board may not decide an appeal from an initial decision if the appeal may be further appealed to the Commission.

(2) An initial decision may be reviewed on the record on which it is based or by a further hearing. If an initial decision is reviewed, it shall be stayed pending final determination of the matter, and it is an action of the Commission only after the final determination is made. If an appeal is filed under subsection (e)(1) of this section, the final determination shall be made by the 180th day after the appeal is filed.

(3) Review of, or appeal from, an initial decision shall be conducted under section 557 of title 5. The Commission may prescribe rules limiting and defining the issues and pleadings on review under section 557(b) of that title.

(g) (1) The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—

(A) reopen a proceeding;

(B) grant rehearing, reargument, or reconsideration of an action of the Commission; and

(C) change an action of the Commission.

An interested party may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the Commission.

(2) The Commission may grant a rehearing, reargument, or reconsideration of an action of the Commission that was taken by a division designated by the Commission if it finds that—

(A) the action involves a matter of general transportation importance; or

(B) the action would be affected materially because of clear and convincing new evidence or changed circumstances.

An interested party may petition for rehearing, reargument, or reconsideration of an action of the Commission under this paragraph under regulations of the Commission. The Commission may stay an action pending a final determination under this paragraph. The Commission shall complete reconsideration and take final action by the 120th day after the petition is granted.

(h) An action of the Commission under this section and an action of a designated division under subsection (c) of this section is effective on the 30th day after service on the parties to the proceeding unless the Commission provides for it to become effective on an earlier date.

(i) Notwithstanding this subtitle, an action of the Commission under this section and an action of a desig-

nated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

(j) The Commission may extend a time period established by this section for a period of not more than 90 days. The extension shall be granted if a majority of the Commissioners agreed to it by public vote.

(k) If an extension granted under subsection (j) of this section is not sufficient to allow for completion of necessary proceedings, the Commission may grant a further extension in an extraordinary situation if—

(1) a majority of the Commissioners agree to the further extension by public vote; and

(2) not later than the 15th day before expiration of the extension granted under subsection (j) of this section, the Commission submits a written report to the Congress that a further extension has been granted. The report shall include—

(A) a full explanation of the reasons for the further extension;

(B) the anticipated duration of the further extension;

(C) the issues involved in the matter before the Commission; and

(D) the names of personnel of the Commission working on the matter.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1348; Pub.L. 96-258, § 1(2), June 3, 1980, 94 Stat. 425; Pub.L. 96-296, § 25(e), July 1, 1980, 94 Stat. 818; Pub.L. 97-375, Title I, § 113, Dec. 21, 1982, 96 Stat. 1821.)

§ 10701a. Standards for rates for rail carriers

(a) Except as provided in subsection (b) or (c) of this section and unless a rate is prohibited by a provision of this title, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish any rate for transportation or other service provided by the carrier.

(b) (1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

(2) In any proceeding to determine the reasonableness of a rate described in paragraph (1) of this subsection—

(A) the shipper challenging such rate shall have the burden of proving that such rate is not reasonable if—

(i) such rate (I) is authorized under section 10707a of this title, and (II) results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; or

(ii) such rate does not meet the description set forth in clause (i) of this subparagraph, but the Commission does not begin an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable; and

(B) the rail carrier establishing the challenged rate shall have the burden of proving that such rate is reasonable if—

(i) such rate (I) is greater than that authorized under section 10707a of this title, or (II) results in a revenue-variable cost percent-

age for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; and

(ii) the Commission begins an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable.

(3) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Commission shall recognize the policy of this title that rail carriers shall earn adequate revenues, as established by the Commission under section 10704(a)(2) of this title.

(c)(1) A rate for transportation or other service provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may not be established below a reasonable minimum. Any rate for transportation by such a rail carrier that does not contribute to the going concern value of such carrier is presumed to be not reasonable. A rate that contributes to the going concern value of such carrier is conclusively presumed not to be below a reasonable minimum.

(2) A rate for transportation by a rail carrier that equals or exceeds the variable cost of providing the transportation is conclusively presumed to contribute to the going concern value of such rail carrier.

(3)(A) Upon the filing of a complaint alleging that a rate is in violation of this subsection, the Commission shall take final action thereon by the 90th day after the date such complaint is filed.

(B) If the Commission determines, based on the record after opportunity for a hearing, that a rate is in violation of this subsection, the Commission shall order such

rate to be raised, but only to the minimum level required by this subsection. The complainant shall have the burden of proving that such rate is in violation of this subsection.

(4)(A) For purposes of this subsection, variable costs shall be determined under formulas or procedures prescribed or certified by the Commission.

(B) In the determination of variable costs for purposes of minimum rate regulation, the Commission shall, on application of the rail carrier proposing the rate, determine only the costs of such carrier and only those costs of the specific service in question unless the specific information is not available. The Commission may not include in such variable costs an expense that does not vary directly with the level of transportation provided under the proposed rate.

(Added Pub.L. 96-448, Title II, § 201(a), Oct. 14, 1980, 94 Stat. 1898.)

§ 10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

(a)(1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classifica-

tion and observe the rule or practice prescribed by the Commission.

(2) The Commission shall maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under that subchapter that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. However, a rate, classification, rule, or practice of a rail carrier may be maintained at a particular level to protect the traffic of another carrier or mode of transportation only if the Commission finds that the rate or classification, or rule or practice related to it, reduces or would reduce the going concern value of the carrier charging the rate. Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

(3) The Commission shall conclude a proceeding under paragraph (2) of this subsection within 180 days after the effective date of Staggers Rail Act of 1980 and thereafter as necessary.

(4) On the basis of the standards and procedures under paragraph (2) of this subsection, the Commission shall, within 180 days after the effective date of the

Staggers Rail Act of 1980 and on an annual basis thereafter, determine which rail carriers are earning adequate revenues.

(b)(1) When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

(B) a water common carrier for providing transportation subject to its jurisdiction under subchapter III of chapter 105 of this title; or

(C) a household goods freight forwarder for providing service subject to its jurisdiction under subchapter IV of chapter 105 of this title;

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2)(A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

(B) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier or motor carrier, the Commission shall consider, among other factors, the need for revenues that are sufficient, under honest, economical and efficient management, to let the carrier provide that transportation or service.

(3) If the carrier is a motor or water common carrier or a household goods freight forwarder, the Commission shall also consider the need, in the public interest, of adequate and efficient transportation or service by that carrier at the lowest cost consistent with providing that transportation or service.

(4) If the carrier is a motor common carrier or a household goods freight forwarder, the Commission shall also consider the inherent advantages of transportation by motor common carrier or the inherent nature of household goods freight forwarding, respectively.

(c)(1) When the Commission finds that a minimum rate of a contract carrier for transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title, or a rule or practice related to the rate or the value of the service under it, violates this chapter or the transportation policy of section 10101 of this title, the Commission may prescribe the minimum rate, rule, or practice for the carrier that is desirable in the public interest and will promote that policy. In prescribing the rate, the Commission may not give a motor or water contract carrier an advantage or preference in competition with a motor or water common carrier, respectively, if an advantage or preference is unreasonable or inconsistent with the public interest and the transportation policy of section 10101 of this title.

(2) When prescribing a minimum rate, or rule or practice related to a rate, for a contract carrier, the Commission shall consider—

(A) the cost of the transportation provided by the carrier; and

(B) the effect of a prescribed minimum rate, or rule or practice, on the movement of traffic by that carrier.

(d) In a proceeding involving competition between carriers of different modes of transportation subject to this subtitle, except rail carriers, the Commission, in determining whether a rate is less than a reasonable minimum rate, shall consider the facts and circumstances involved in moving the traffic by the mode of carrier to which the rate is applicable. Subject to the transportation policy of section 10101 of this title, rates of a carrier may not be maintained at a particular level to protect the traffic of another mode of transportation.

(e) In a proceeding involving a proposed increase or decrease in rail carrier rates, the Commission shall specifically consider allegations that the increase or decrease would (1) change the rate relationships between commodities, ports, places, regions, areas, or other particular descriptions of traffic (without regard to previous Commission consideration or approval of those relationships), and (2) have a significant adverse effect on the competitive position of shippers or consignees served by the rail carrier proposing the increase or decrease. The Commission shall investigate to determine whether the change or effect violates this subtitle when it finds that those allegations are substantially supported on the record. The investigation may be made either before or after the proposed increase or decrease becomes effective and either in that proceeding or in another proceeding.

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be in extension of a complaint pending before the Commission. A complaint under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1373; Pub.L. 96-296, § 13(b), July 1, 1980, 94 Stat. 803; Pub.L. 96-448, Title II, § 205(b), Oct. 14, 1980, 94 Stat. 1906; Pub.L. 97-261, § 9(b), Sept. 20, 1982, 96 Stat. 1109; Pub.L. 99-521, § 7(b), Oct. 22, 1986, 100 Stat. 2994).

§ 10706. Rate agreements: exemption from antitrust laws

(a)(1) In this subsection—

(A) "affiliate" means a person controlling, controlled by, or under common control or ownership with another person and "ownership" refers to equity holdings in a business entity of at least 5 percent.

(B) "single-line rate" refers to a rate or allowance proposed by a single rail carrier that is applicable only over its line and for which the transportation (exclusive of terminal services by switching, drayage or other terminal carriers or agencies) can be provided by that carrier.

(C) "practicably participates in that movement" shall have such meaning as the Commission shall by regulation prescribe.

(2)(A) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title that is a party to an agreement of at least 2 rail carriers or an agreement with a class of carriers referred to in subsection (d)(1)(B)-(E) of this section, that relates to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them, shall apply to the Commission for approval of that agreement under this subsection. The Commission shall approve the agreement only when it finds that the making and carrying

out of the agreement will further the transportation policy of section 10101a of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of its approval. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement. However, the Commission may not approve or continue approval of an agreement when the condtions required by it are not met or if it does not receive a verified statement under subparagraph (B) of this paragraph.

(B) The Commission may approve an agreement under subparagraph (A) of this paragraph only when the carriers applying for approval file a verified statement with the Commission. Each statement must specify for each rail carrier that is a party to the agreement—

(i) the name of the carrier;

(ii) the mailing address and telephone number of its headquarter's office; and

(iii) the names of each of its affiliates and the names, addresses, and affiliates of each of its officers and directors and of each person, together with an affiliate, owning or controlling and debt, equity, or security interest in it having a value of at least $1,000,000.

(3)(A) An organization established or continued under an agreement approved under this subsection shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed. Such an organization may not—

(i) permit a rail carrier to discuss, to participate in agreements related to, or to vote on single line rates proposed by another rail carrier, except that for purposes of general rate increases and broad tariff changes only, if the Commission finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part;

(ii) permit a rail carrier to discuss, to participate in agreements related to, or to vote on rates related to a particular interline movement unless that rail carrier practicably participates in that movement; or

(iii) if there are interline movements over two or more routes between the same end points, permit a carrier to discuss, to participate in agreements related to, or to vote on rates except with a carrier which forms part of a particular single route. This clause shall take effect on January 1, 1984, or on such earlier date as the Commission determines. If the Commission finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part.

(B) Until January 1, 1984, subparagraph (A)(ii) and (A)(iii) of this paragraph do not apply to—

(i) general rate increases to cover inflationary cost increases, or general rate decreases, for joint rates if the agreement gives shippers, under specified procedures, at least 15 days notice of the proposal and an opportunity to present comments on it before a tariff containing the increases or decreases is filed with the Commission; or

(ii) broad tariff changes that are of at least substantially general application throughout the area where the changes will apply, except single line rates where subparagraph (A)(i) of this paragraph prohibits the participation of carriers with single line rates.

If the Commission finds at any time that the implementation of this subparagraph is not feasible, it may delay or suspend such implementation in whole or in part.

(C)(i) In any proceeding in which a party alleges that a rail carrier voted or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such carrier and one or more other carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement—

(I) was in accordance with an agreement approved under paragraph (2) of this subsection; or

(II) concerned an interline movement of the carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of clause (I) or (II) are satisfied before allowing the introduction of any such evidence.

(D) An organization described in subparagraph (A) of this paragraph shall provide that transcripts or sound recordings be made of all meetings, that records of votes be made, and that such transcripts or recordings and voting records be submitted to the Commission and made available to other Federal agencies in connection with their statutory responsibilities over rate bureaus, except that such material shall be kept confidential and shall not be subject to disclosure under section 552 of title 5, United States Code.

(4) Notwithstanding any other provision of this subsection, one or more rail carriers may enter into an agreement, without obtaining prior Commission approval, that provides solely for compilation, publication, and other distribution of rates in effect or to become effective. The Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) shall not apply to parties and other persons with respect to making or carrying out such agreement. However, the Commission may, upon application or on its own initiative, investigate whether the parties to such an agreement have exceeded its scope, and upon a finding that they have, the Commission may issue such orders as are necessary, including an order dissolving the agreement, to ensure that actions taken pursuant to the agreement are limited as provided in this paragraph.

(5)(A) Whenever two or more shippers enter into an agreement to discuss among themselves that relates to the amount of compensation such shippers propose to be paid by rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, for use by such rail carriers of rolling stock owned or leased by such shippers, the

shippers shall apply to the Commission for approval of that agreement under this paragraph. The Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy set forth in section 10101a of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of approval. If the Commission approves the agreement, it may be made and carried out under its terms and under the terms required by the Commission, and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement. The Commission shall approve or disapprove an agreement under this paragraph within one year after the date application for approval of such agreement is made.

(B) If the Commission approves an agreement described in subparagraph (A) of this paragraph and the shippers entering into such agreement and the rail carriers proposing to use rolling stock owned or leased by such shippers, under payment by such carriers or under a published allowance, are unable to agree upon the amount of compensation to be paid for the use of such rolling stock, any party directly involved in the negotiations may require that the matter be settled by submitting the issues in dispute to the Commission. The Commission shall render a binding decision, based upon a standard of reasonableness and after taking into consideration any past precedents on the subject matter of the negotiations, no later than 90 days after the date of the submission of the dispute to the Commission.

(C) Nothing in this paragraph shall be construed to change the law in effect prior to the effective date of the Staggers Rail Act of 1980 with respect to the obligation of rail carriers to utilize rolling stock owned or leased by shippers.

(b)(1) In this subsection, "single-line rate" refers to a rate, charge, or allowance proposed by a single motor common carrier that is applicable only over its line and for which the transportation can be provided by that carrier.

(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

(3) Agreement submitted to the Commission under this subsection may be approved by the Commission only if each of the following conditions are met:

(A) Each carrier which is a party to an agreement must file with the Commission a verified state-

ment that specifies its name, mailing address, and telephone number of its main office; the names of each of its affiliates; the names, addresses, and affiliates of each of its officers and directors; the names, addresses, and affiliates of each person, together with an affiliate, owning or controlling any debt, equity, or security interest in it having a value of at least $1,000,000. In this subparagraph, "affiliate" means a person controlling, controlled by, or under common control or ownership with another person and "ownership" means equity holdings in a business entity of at least 5 percent.

(B) Any organization established or continued under an agreement approved under this subsection must comply with the following requirements:

(i) subject to the provisions of subparagraphs (C), (D), (E), and (F) of this paragraph, (I) the organization may allow any member carrier to discuss any rate proposal docketed, but (II) after January 1, 1981, only those carriers with authority to participate in the transportation to which the rate proposal applies may vote upon such rate proposal;

(ii) the organization may not interfere with each carrier's right of independent action and may not change or cancel any rate established by independent action after the date of enactment of this subsection, other than a general increase or broad rate restructuring, except that changes in such rates may be effected, with the consent of the carrier or carriers that initiated the independent action, for the purpose of tariff simplification, removal of discrimination, or elimination of obsolete items;

(iii) the organization may not file a protest or complaint with the Commission against any

tariff item published by or for the account of any motor carrier;

(iv) the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item published by or for the account of any of its member carriers;

(v) upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization;

(vi) the organization may not allow a carrier to vote for one or more other carriers without specific written authority from the carrier being represented; and

(vii) the organization shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed, except that if unusual circumstances require, the organization may extend such period, subject to review by the Commission.

(C) No agreement approved under this subsection may provide for discussion of or voting on rates to which the provisions of section 10708(d) or 10730 (b) of this title apply, except that rates established or filed under section 10730 of this title before the date of enactment of the Motor Carrier Act of 1980 or changes with respect to such rates may be discussed or voted on under agreements approved under this subsection until January 1, 1984.

(D) No agreement approved under this subsection may provide for discussion of or voting upon single-line rates on or after January 1, 1984, except that such date shall be July 1, 1984, if the Motor Carrier Ratemaking Study Commission does not submit its final report under section 14(b)(4) of the Motor Carrier Act of 1980 on or before January 1, 1983. This subparagraph shall not apply to any single-line rate proposed by a motor common carrier of passengers. This subparagraph and subparagraph (B)(i)(II) of this paragraph shall not apply to the following:

(i) general rate increases or decreases if the agreement gives shippers, under specified procedures, at least 15 days' notice of the proposal and an opportunity to present comments on it before a tariff containing the increases or decreases is filed with the Commission and if discussion of such increases or decreases is limited to industry average carrier costs and, after the date of elimination of the antitrust immunity by this subparagraph, does not include discussion of individual markets or particular single-line rates;

(ii) changes in commodity classification;

(iii) changes in tariff structures if discussion of such changes is limited to industry average carrier costs and, after the date of elimination of antitrust immunity by this subparagraph, does not include discussion of individual markets or particular single-line rates;

(iv) publishing of tariffs, filing of independent actions for individual members carriers, providing of support services for members, and changes in rules or regulations which are of at

least substantially general application throughout the area in which such changes will apply.

(E) On and after January 1, 1983, no agreement approved under this subsection may provide for discussion of or voting upon any single-line rate proposed by a motor common carrier of passengers. On and after January 1, 1984, no agreement approved under this subsection may provide for discussion of or voting upon any joint rate proposed by one or more motor common carriers of passengers. This subparagraph shall not apply to any rate applicable to special or charter transportation. This subparagraph and subparagraph (B)(i)(II) of this paragraph shall not apply to the following:

(i) any general rate increase or decrease, broad change in tariff structure, or promotional or innovative fare change, as defined by the Commission and subject to such notice requirements as the Commission may specify by regulation, if discussion of such general increase or decrease is limited to industry average carrier costs and intermodal competitive factors and does not include discussion of individual markets or particular single-rates or joint rates; and

(ii) publishing of tariffs, filing of independent actions for individual member carriers, providing of support services for members, and changes in rules or regulations which are of at least substantially general application throughout the area in which such changes will apply.

(F) After the effective date of this subparagraph, no agreement approved under this subsection may provide for discussion of or voting upon any rate applicable to special or charter transportation proposed by a motor common carrier of passengers. This sub-

paragraph shall not apply to publication of any such rate.

(G) In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(H) The Commission shall, by regulation, determine reasonable quorum standards to be applied for meetings of organizations established or continued under an agreement approved under this subsection.

(4) Notwithstanding any other provision of this subtitle, before the date on which the antitrust immunity is eliminated for discussion of or voting on single-line rates by paragraph (3)(D) of this subsection, the Commission may not take any action which would, on the basis of the type of carrier service involved (including service by carriers singly or in combination with other carriers), result in the exclusion of one or more motor common carriers of property from discussion or voting under agreements authorized by this subsection on matters concerning rates, allowances, classifications, or divisions, except that before such date, the Commission may issue regulations which take effect on or after such date to carry out the provisions of such paragraph.

(5) Notwithstanding any other provision of this subtitle (other than paragraph (3)(F) of this subsection, relating to special and charter transportation of passengers), before January 1, 1983, the Commission may not take any action which would, on the basis of the type of carrier service involved (including service by carriers singly or in combination with other carriers), result in the exclusion of one or more motor common carriers of passengers from discussion or voting under agreements

authorized by this subsection on matters concerning rates, allowances, or divisions, except that before January 1, 1983, the Commission may issue regulations which take effect on or after January 1, 1983, to carry out the provisions of paragraph (3)(E) of this subsection.

(c) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title (except a rail carrier or a motor common carrier) that is a party to an agreement of at least 2 carriers related to rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them, may apply to the Commission for approval of that agreement under this subsection. The Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of approval. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

(d)(1) In this subsection, carriers are classified as follows:

(A) Rail, express, and sleeping car carriers are a class.

(B) Pipeline carriers are a class.

(C) Motor carriers are a class.

(D) Water carriers are a class.

(E) Household goods freight forwarders are a class.

(2) The Commission may not approve an agreement under this section—

(A) between or among carriers of different classes unless, in addition to the finding required under subsection (a), (b), or (c) of this section, the Commission finds that the agreement is limited to matters related to transportation under joint rates or over through routes;

(B) related to a pooling, division, or other matter to which subchapter III of chapter 113 of this title applies; or

(C) establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take independent action before or after a determination is made under that procedure.

(e) The Commission may require an organization established or continued under an agreement approved under this section to maintain records and submit reports. The Commission, or its delegate, may inspect a record maintained under this section.

(f) The Commission may review an agreement approved under subsection (a), (b), or (c) of this section and shall change the conditions of approval or terminate it when necessary to comply with (1) the public interest and subsection (a), or (2) subsection (b) or (c). The Commission shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(g) The Commission may begin a proceeding under this section on its own initiative or on application. Action of

the Commission under this section (1) approving an agreement, (2) denying, ending, or changing approval, (3) prescribing the conditions on which approval is granted, or (4) changing those conditions, has effect only as related to application of the antitrust laws referred to in subsection (a), (b), or (c) of this section.

(h) The Commission shall review each agreement approved under subsection (a) of this section periodically, but at least once every 3 years (1) to determine whether the agreement or an organization established or continued under one of those agreements still complies with the requirements of that subsection and the public interest, and (2) to evaluate the success and effect of that agreement or organization on the consuming public and the national rail freight transportation system. If the Commission finds that an agreement or organization does not conform to the requirements of that subsection, it shall end or suspend its approval. The Commission shall report to the President and Congress the results of the review as a part of its annual report under section 10311 of this title.

(i) (1) The Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, shall prepare periodically an assessment of, and shall report to the Commission on—

(A) possible anticompetitive features of—

(i) agreements approved or submitted for approval under subsection (a) of this section; and

(ii) an organization operating under those agreements; and

(B) possible ways to alleviate or end an anticompetitive feature, effect, or aspect in a manner that will further the goals of this subtitle and of the transportation policy of section 10101a of this title.

(2) Reports received by the Commission under this subsection shall be published and made available to the public under section 552(a) of title 5.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1377; Pub.L. 96-258, § 1(7), June 3, 1980, 94 Stat. 426; Pub.L. 96-296, § 14(a), (c), (d), July 1, 1980, 94 Stat. 803, 808; Pub.L. 96-448, Title II, §§ 219(a)-(e), 224(b), Oct. 14, 1980, 94 Stat. 1926-1929; Pub.L. 97-261, § 10(a)-(d), Sept. 20, 1982, 96 Stat. 1109, 1110; Pub.L. 98-216, § 2(12), Feb. 14, 1984, 98 Stat. 5; Pub.L. 99-521, § 7(c), Oct. 22, 1986, 100 Stat. 2995.)

§ 10707. Investigation and suspension of new rail carrier rates, classifications, rules, and practices

(a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

(b)(1) The Commission must complete a proceeding under this section and make its final decision by the end of the 5th month after the rate, classification, rule, or practice was to become effective, except that if the Commission reports to the Congress by the end of such 5th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

(A) is effective at the end of that time period; or

(B) if already in effect at the end of that time period, remains in effect.

(2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(c)(1) The Commission may not suspend a proposed rate, classification, rule, or practice during the course of a Commission proceeding under this section unless it appears from the specific facts shown by the verified statement of a person that—

(A) it is substantially likely that the protestant will prevail on the merits;

(B) without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

(C) because of the peculiar economic circumstances of the protestant, the provisions of subsection (d) of this section do not protect the protestant.

(2) The burden shall be on the protestant to prove the matters described in paragraph (1)(A), (B), and (C) of this subsection.

(d)(1) If the Commission does not suspend a proposed rate increase under subsection (c) of this section, the Commission shall require the rail carrier to account for all amounts received under the increase until the Commission completes its proceedings under subsection (b) of this section. The accounting shall specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield (on the date

the statement is filed) of marketable securities of the United States Government having a duration of 90 days.

(2) If a rate is suspended under subsection (c) of this section and any portion of such rate is later found to be reasonable under this title, the carrier shall collect from each person using the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days, except that this paragraph shall not apply to general rate increases under section 10706 of this title.

(3) If any portion of a proposed rate decrease is suspended under subsection (c) of this section and later found to be reasonable under this title, the rail carrier may refund any part of the portion of the decrease found to comply with this title if the carrier makes the refund available to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

(4) Notwithstanding the provisions of section 10741 or section 10761 of this title, the Commission shall, by rule, establish standards and procedures permitting a rail carrier to waive the collection of amounts due under this subsection if such amounts are not significant.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1380; Pub.L. 96-448, Title II, § 207, Oct. 14, 1980, 94 Stat. 1907.)

§ 10707a. Zone of rail carrier rate flexibility

(a) in this section—

(1)(A) "base rate" means, with respect to the transportation of a particular commodity (i) for the 24-month period beginning on October 1, 1980, the

rate in effect on October 1, 1980, (ii) for the 24-month period beginning on October 1, 1982, the rate in effect on October 1, 1982, and (iii) for the 5-year period beginning on October 1, 1984, and for each subsequent 5-year period, the rate in effect on the first day of the applicable 5-year period.

(B) If no rate exists for the transportation of a particular commodity on October 1, 1980, the base rate for the transportation of such commodity shall be the rate established by the rail carrier (divided by the latest rail cost adjustment factor published by the Commission), unless such rate is found to be unreasonable by the Commission, in which case the base rate shall be the rate authorized by the Commission (divided by the latest rail cost adjustment factor published by the Commission).

(2)(A) "adjusted base rate" means the base rate for the transportation of a particular commodity multiplied by the latest rail cost adjustment factor published by the Commission pursuant to this paragraph.

(B) Commencing with the fourth quarter of 1980, the Commission shall, as often as practicable but in no event less often than quarterly, publish a rail cost adjustment factor which shall be a fraction, the numerator of which is the latest published Index of Railroad Costs (which index shall be compiled or verified by the Commission, with appropriate adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor), and the denominator of which is the same index for the fourth quarter of 1980, or for the fourth quarter of 1982 or for the fourth quarter of every fifth year thereafter, as appropriate.

(b)(1) Except as provided in paragraph (2)[1] of this subsection, a rail carrier providing transportation sub-

[1] So in original. Probably should be "3".

ject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may increase any rate over which the Commission has jurisdiction under section 10709 of this title so long as the increased rate is not greater than the adjusted base rate for the transportation involved, plus any rate increases implemented under subsection (c) or (d) of this section.

(2) A rate increase authorized under this subsection may not be found to exceed a reasonable maximum for the transportation involved.

(3) A rail carrier may not increase a rate under this subsection to the extent that the cost increases to such carrier due to inflation are recovered through (A) general rate increases pursuant to section 10706 of this title, or (B) inflation-based rate increases under section 10712 of this title applicable to that rate.

(c)(1) During the 12-month period beginning on the effective date of the Staggers Rail Act of 1980 and during each of the 3 succeeding 12-month periods, a rail carrier may, in addition to rate increases authorized under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 6 percent of the adjusted base rate, except that in no event shall the total increase under this subsection result in a rate which is more than 118 percent of the adjusted base rate.

(2)(A) If any portion of a rate increase under this subsection is not implemented in the year in which it is authorized, such portion may, except as provided in subparagraph (B) of this paragraph, be implemented only in the next succeeding year.

(B) If any portion of the total rate increase authorized under this subsection is not implemented by the end of the 4-year period beginning on the effective date of the Staggers Rail Act of 1980, such portion may be imple-

mented in the next 2 succeeding years, except that in no event may a rail carrier increase a rate under this subsection or under subsection (d) of this section in either of such 2 succeeding years by an annual amount of more than 10 percent of the adjusted base rate.

(d)(1) Except as provided in paragraph (3) of this subsection, during the 12-month period beginning on October 1, 1984, and during each succeeding 12-month period, a rail carrier may, in addition to rate increases under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 4 percent of the adjusted base rate.

(2) No portion of any rate increase under this subsection which is not implemented in the year in which it is authorized may be implemented in any other year.

(3)(A) The provisions of this subsection shall not apply to a rail carrier proposing to increase a single line rate if such carrier earns adequate revenues, as determined by the Commission under section 10704(a)(2) of this title.

(B) The Commission shall, after a hearing on the record, prescribe such rules with respect to joint rates as necessary to ensure that rail carriers which earn adequate revenues, as determined under section 10704(a)(2) of this title, do not receive the rate increases authorized by this subsection unless the Commission determines that it is unable to prescribe such rules without precluding rail carriers not earning adequate revenues from receiving the rate increases authorized under this subsection.

(e)(1) Notwithstanding the provisions of section 10707 of this title, in the case of any rate increase by a rail carrier that is authorized under subsection (c) or (d) of this section—

(A)(i) the Commission may not suspend such rate increase pending final Commission action; and

(ii) except as provided in paragraph (2) of this subsection, the Commission may not begin an investigation proceeding under section 10707 of this title with respect to the reasonableness of such rate increase; but

(B) an interested party may file a complaint under section 11701(b) of this title alleging that such rate increase violates the provisions of this subtitle.

In considering any complaint challenging a rate increase that is authorized under subsection (c) of this section and that results in a revenue-variable cost percentage that is less than the lesser of the percentages described in clauses (i) and (ii) of paragraph (2)(A), the Commission shall, in determining the reasonableness of such rate increase, give due consideration to whether the carrier proposing the rate increase has attained adequate revenues, as determined by the Commission under section 10704(a)(2) of this title, giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved and also the policy of bringing to an adequate level the revenues of carriers not having an adequate revenue level.

(2)(A) If a rate increase authorized under this section in any year results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than—

(i) 20 percentage points above the revenue-variable cost percentage applicable in that year under section 10709(d) of this title; or

(ii) a revenue-variable cost percentage of 190 percent,

whichever is less, the Commission may, on its own initiative, or on complaint of an interested party, begin an investigation proceeding to determine whether the proposed rate increase violates this subtitle.

(B) In determining whether to investigate or not to investigate any proposed rate increase that results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of subparagraph (A) of this paragraph (without regard to whether such rate increase is authorized under this section), the Commission shall set forth its reasons therefor, giving due consideration to the following factors:

(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

(ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(iii) the impact of the proposed rate or rate increase on the attainment of the national energy goals and the rail transportation policy under section 10101a of this title, taking into account the railroads' role as a primary source of energy transportation and the need for a sound rail transportation system in accordance with the revenue adequacy goals of section 10704 of this title.

This subparagraph shall not be construed to change existing law with regard to the nonreviewability of such determination.

(C) In determining whether a rate is reasonable, the Commission shall consider, among other factors, evidence of the following:

(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

(ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if

any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(iii) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

(f) In any proceeding under this section, evidence of the underlying rail carrier rate is admissible.

(g) A finding by the Commission that a rate increase exceeds the increase authorized under this section does not establish a presumption that (1) the rail carrier proposing such rate increase has or does not have market dominance over the transportation to which the rate applies, or (2) the proposed rate exceeds or does not exceed a reasonable maximum.

(h) The authority of the Commission to determine and prescribe reasonable rules, classifications, and practices may not be used, directly or indirectly, to limit the rates which rail carriers are otherwise authorized to establish under this subtitle.

(Added Pub.L. 96-448, Title II, § 203(a), Oct. 14, 1980, 94 Stat. 1901.)

§ 10728. Separate rates for distinct rail services

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may, on its own initiative or at the request of a shipper or receiver of property, establish separate rates for distinct rail services to—

(1) encourage competition;

(2) promote increased reinvestment by rail carriers; and

(3) encourage and make easier increased nonrailroad investment in the production of rail services.

(b) The Commission shall maintain expeditious procedures to permit separate rates for distinct rail services to—

(1) encourage those services to be priced in accordance with the cash-outlay incurred by the carrier and the demand for them; and

(2) enable shippers and receivers to evaluate transportation and related rates and alternatives.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1388.)

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1394; Pub.L. 96-296, § 33(c), July 1, 1980, 94 Stat. 825.)

§ 11121. Criteria

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service. The Commission may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service if the Commission decides that the rail carrier has materially failed to furnish that service. The Commission may begin a proceeding under this paragraph when an interested person files an application with it. The Commission may act only after a hearing on the record and an affirmative finding, based on the evidence presented, that—

(A) providing the facilities or equipment will not materially and adversely affect the ability of the carrier to provide safe and adequate transportation;

(B) the amount spent for the facilities or equipment, including a return equal to the carrier's current cost of capital, will be recovered; and

(C) providing the facilities or equipment will not impair the ability of the carrier to attract adequate capital.

(2) The Commission may require a rail carrier to—

(A) file its car service rules with the Commission; and

(B) incorporate those rules in its tariffs.

(b) The Commission may designate and appoint agents and agencies to make and carry out its directions related to car service and matters under sections 11123-11125, 11127, and 11128(a)(1) of this title.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1421; Pub. L. 96-258, § 1(11), June 3, 1980, 94 Stat. 426.)

§ 11122. Compensation and practice

(a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1421; Pub. L. 96-448, Title II, § 224(a), Oct. 14, 1980, 94 Stat. 1929.)

§ 11701. General authority

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker or freight forwarder is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. If the Commission finds that

a motor private carrier is violating section 10530 of this subtitle, the Commission shall take appropriate action to compel compliance with such section. The Commission may take that action only after giving the carrier, broker or freight forwarder notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle or a motor carrier or motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title, or freight forwarder. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1449; Pub. L. 96-296, § 26(a), July 1, 1980, 94 Stat. 818; Pub. L. 98-554, Title II, § 226(c)(4), Oct. 30, 1984, 98 Stat. 2851; Pub. L. 99-521, § 12(a), Oct. 22, 1986, 100 Stat. 2998.)

§ 11705. Rights and remedies of persons injured by certain carriers

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

(b) (1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is or a freight forwarder liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title or the applicable freight forwarder rate, as the case may be.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) A person may file a complaint with the Commission under section 11701(b) of this title or bring a civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of

this title. A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title.

(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.

(d)(1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Commission requiring the payment of damages by a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title, the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Commission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff resides, (B) in which the principal operating office of the carrier is located, (C) if a rail carrier, through which the railroad line of that carrier runs, or (D) if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil

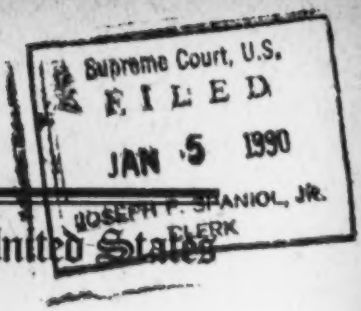
action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1451; Pub.L. 99-521, § 12(b), Oct. 22, 1986, 100 Stat. 2998.)

(3)



No. 89-688

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's change of policy regarding the propriety of railroad charges for hauling empty, privately owned cars to and from repair facilities was permissible.

2. Whether the Interstate Commerce Commission's decison to apply its change of policy in the proceeding in which it announced the change was permissible.

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GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 872 F.2d 1048. The opinion of the court of appeals denying rehearing (Pet. App. 30a-34a) is reported at 883 F.2d 1029. The decision of the Interstate Commerce Commission dismissing petitioners' complaint (Pet. App. 37a-68a) is reported at 3 I.C.C.2d 599. The other decisions of the Interstate Commerce Commission (Pet. App. 69a-100a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on April 14, 1989, and a petition for

rehearing was denied on June 30, 1989 (Pet. App. 35a-36a). On September 13, 1989, the Chief Justice extended the time within which to petition for certiorari to and including October 28, 1989. The petition for certiorari was filed on October 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As common carriers, railroads are obligated to furnish sufficient numbers of suitable cars to satisfy their customers' reasonable transportation requirements. Pet. App. 4a, 38a. The Interstate Commerce Commission (the Commission) is responsible for regulating and enforcing railroads' car service obligations. 49 U.S.C. 11121. Railroads may satisfy their obligations to furnish cars in several ways. They may own their own cars, they may borrow cars from another railroad, or they may lease privately owned cars, which are often furnished by shippers. If railroads lease privately owned cars, they frequently must haul the empty cars to and from repair facilities. The issue in this litigation is whether the railroads may charge private car owners for hauling the empty cars to and from repair facilities. Pet. App. 4a-5a, 38a-39a.

2. In 1976 and 1980, Congress enacted significant changes in national rail transportation policy. In 1976, Congress passed the Railroad Revitalization and Reform Act (the 4R Act), Pub. L. No. 94-210, 90 Stat. 31, and, in 1980, Congress passed the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895. Both statutes were intended to increase the role of competition and market forces in railroad operations. The 4R Act, for instance, was intended, in part, "to eliminate needless or harmful regulatory constraints and to allow railroads to compete with other modes of transportation." S. Rep. No. 499,

94th Cong., 1st Sess. 1 (1975). The Staggers Act, for its part, explicitly states that "[i]n regulating the railroad industry, it is the policy of the United States Government * * * to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail, * * * to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission * * * [and] to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation." 49 U.S.C. 10101a.

3. In 1983, two railroads—respondents Indiana Harbor Belt Railway Company and the Baltimore and Ohio Chicago Terminal Railroad Company—filed tariffs for hauling empty, privately owned cars to and from repair facilities. Petitioners, which are private car owners, filed complaints challenging the action. Under then-existing Commission policy, a railroad could not levy a direct charge for transporting privately owned cars to and from repair facilities if it derived more than *de minimis* revenues from the loaded movements of the cars. That policy had been announced in *Union Tank Car Co., Terminal Service*, 268 I.C.C. 338 (1947), and was most recently reaffirmed in *General American Transportation Corp.* v. *Indiana Harbor Belt R.R.*, 357 I.C.C. 102 (1977) (*Indiana Harbor I*), aff'd, 577 F.2d 394 (7th Cir. 1978), a proceeding involving many of the same parties as the current litigation. Pet. App. 38a-42a. Under *Indiana Harbor I*, the cost of empty car repair moves was generally viewed as a collective responsibility of the railroad industry, subject to an "equalization" formula employed in an effort to distribute the costs equitably with respect to tank cars. Pet. App. 40a & n.5; 357 I.C.C. at 127.

Petitioners' complaints were referred to an Administrative Law Judge, who concluded that the *Indiana Harbor I* policy should no longer be applied because of subsequent legislative changes. Pet. App. 79a-91a. The Commission Review Board reversed the ALJ's decision. *Id.* at 92a-100a.

The full Commission then considered the matter. In October 1984, the Commission published a notice informing the public that the Commission might modify or reverse *Indiana Harbor I* in light of statutory changes and requesting comment on whether such a decision would be appropriate. 49 Fed. Reg. 39,740 (1984). In March 1985, the Commission published an additional notice, describing comments that had been filed, posing certain questions, and soliciting additional comments. 50 Fed. Reg. 10,867 (1985).

On February 17, 1987, the Commission issued its decision in *Indiana Harbor II*. Pet. App. 37a-68a. The Commission concluded that "the existing policy prohibiting tariff charges misallocates economic burdens among carriers and conflicts with the Congressional mandate for demand-based rail pricing, rate flexibility, and revenue adequacy." *Id.* at 38a. Accordingly, the Commission overruled *Indiana Harbor I*. The Commission first found that *Indiana Harbor I* "does not produce an efficient or equitable system for compensating rail carriers for repair moves" (Pet. App. 44a-45a) and that it results in "misallocation and cross-subsidization" (*id.* at 48a). The Commission then determined that the prohibition of charges for empty car repair moves was not compelled by statute. *Id.* at 48a-55a. To the contrary, the Commission reasoned that reconsideration of *Indiana Harbor I* "in light of the significant changes in the Commission's regulation of railroads resulting from the 4R Act and

Staggers Act" was "necessary." Pet. App. 55a.[1] The Commission concluded that the *Indiana Harbor I* "method of compensation for cars moving empty in repair moves is directly contrary to current statutory provisions that require the Commission to encourage efficient pricing and provide all carriers with a realistic opportunity to earn adequate revenues." Pet. App. 55a-56a. Finally, the Commission determined that it was appropriate to apply the decision to the tariffs at issue. *Id.* at 65a-66a.

On February 22, 1988, the Commission denied petitions to reopen (Pet. App. 69a-78a); it reiterated that the overruled ban on tariffs for empty repair moves was "outmoded, impractical, and irrational." *Id.* at 71a.

4. The court of appeals denied petitioners' petitions for review. Pet. App. 21a-27a. The court first rejected petitioners' contention that Congress specifically intended to bar carriers from charging for the empty movement of privately owned rail cars. Pet. App. 7a-10a. Although ~~that~~ the Seventh Circuit had twice affirmed the *Indiana Harbor I* policy, the court concluded that the Seventh Circuit's opinions did not rest "on a construction of the Interstate Commerce Act, much less a finding of specific congressional intent" and that the Seventh Circuit had "simply held that the *Indiana Harbor I* policy was not arbitrary and capricious." Pet. App. 9a. The court also rejected the claim that congressional actions in recodifying the Interstate Commerce Act and in enacting the Staggers Act were evidence of congressional ratification of the changed rule. *Id.* at 9a-10a. The court then found that the Commission's decision was reasonable, that the evidence in the

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[1] The Commission noted that, although the 4R Act had been passed shortly before *Indiana Harbor I*, the decision in *Indiana Harbor I* failed to give it adequate consideration and the Staggers Act had been passed since *Indiana Harbor I*. Pet. App. 41a-42a.

record supported the Commission's conclusions, that the policies underlying the 4R Act and the Staggers Act also supported the Commission's decision, and that the Commission had addressed all pertinent considerations. *Id.* at 10a-24a. Finally, the court concluded that the request for comments did not convert the adjudication into a rulemaking, and that application of the new policy to the tariffs under review was appropriate. *Id.* at 25a-27a.

Accompanying the denial of a petition for rehearing, Judge Silberman, joined by the other two members of the panel which had decided the case, issued a supplemental opinion addressing the principal contention in the rehearing petition that the proceeding was a rulemaking and thus could not be applied to the tariffs under review. Pet. App. 30a-34a. The opinion reiterated that a change in policy was permissible in an adjudication and that "[w]hat this case really reduces to is the fairness of retroactive application of the new principle developed in *Indiana Harbor II* to the adjudicatory parties, a question * * * adequately addressed in the original panel opinion." *Id.* at 34a.

ARGUMENT

Petitioners contend that the Commission's change in policy was impermissible and that, if it was permissible, it should not have been applied to the tariffs in the proceeding in which it was announced. Neither contention is well founded; the Commission's determinations, both about the change in policy and its application to the parties, were sound and do not warrant further review.

1. Petitioners first contend (Pet. 11-16) that Congress ratified the Commission's prior policy, and that a reversal of the policy "could be justified only by persuasive evidence that *Congress* had changed its mind." Pet. 12.

As evidence of congressional ratification, however, petitioners point only to the fact that "Congress extensively amended the Interstate Commerce Act in 1980 with passage of the Staggers Act" and "Congress did not make any pertinent changes to the provisions" on which the Commission had relied in *Indiana Harbor I* and on which the Seventh Circuit had relied in upholding the Commission's policy. Pet. 11-12. But as this Court has consistently warned, such reliance on congressional silence must be hedged with considerable caution.[2] An inquiry into congressional purpose and intent is necessarily contextual, and congressional silence is but one factor to be considered in such an inquiry.[3]

Petitioners' extensive reliance on congressional silence is especially unsound in this context. As the court of appeals explained, such reliance "is particularly weak in this case given the abundant evidence * * * that Congress, in passing

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[2] See, *e.g.*, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that—silence"); *Zuber* v. *Allen*, 396 U.S. 168, 185-186 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. * * * Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence."); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) ("Re-enactment * * * is an unreliable indicium at best."); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941) (congressional reenactment "is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.").

[3] Rather than "disarray" (Pet. 14), the decisions cited by petitioners (Pet. 14-15) reflect this necessarily contextual inquiry into congressional purpose and intent.

the Staggers Act, wanted to put an end to ratemaking practices involving railroad cross-subsidization and other inefficiencies." Pet. App. 10a n.10. Congressional passage of the Staggers Act without either explicitly disapproving *Indiana Harbor I* or authorizing a change in *Indiana Harbor I* thus cannot be construed as reflecting a congressional intent to bar the Commission from reexamining its policy regarding railroad charges for empty car repair moves.[4]

2. Petitioners also contend (Pet. 16-18) that the court of appeals' decision conflicts with three decisions of the Seventh Circuit—the decision affirming *Indiana Harbor I* (*Indiana Harbor Belt R.R.* v. *General American Transportation Corp.*, 577 F.2d 394 (1978)) and two subsequent decisions applying *Indiana Harbor I* (*Atchison, T.&S.F. Ry.* v. *Union Tank Car Co.*, 611 F.2d 1184 (1979); *Evans Products Co.* v. *ICC*, 729 F.2d 1107 (1984)). As the court below concluded, however, there is no conflict.

The court of appeals correctly noted that the Seventh Circuit decisions did not rest "on a construction of the Interstate Commerce Act," but rather on a determination that "the *Indiana Harbor I* policy was not arbitrary and capricious." Pet. App. 9a. Petitioners' argument to the

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[4] As the Commission noted (Pet. App. 64a), this Court has long stressed the importance of the Commission's ability to revise its policies in light of changed conditions. See *American Trucking Ass'ns* v. *Atchison, T.&S.F.R.R.*, 387 U.S. 397, 416 (1967) ("[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.").

contrary rests on the claim that the Seventh Circuit's opinions must be read as definitive statutory constructions, rather than as approvals of a permissible exercise of agency discretion. Pet. 16. In announcing its standard of review to guide consideration of *Indiana Harbor I*, however, the Seventh Circuit left no doubt that its decision rested on a finding of permissible administrative action:

> The responsibility of the court in reviewing a decision and order of the Commission properly before it consists in deciding 1. whether the Commission has acted within the power delegated to it by law; 2. whether the Commission's decision is supported by facts or substantial evidence; 3. whether the order is based on specific findings of fact from the record; 4. whether the Commission's conclusions have a rational basis.

577 F.2d at 397. Although, as petitioners point out, the Seventh Circuit referred to statutory provisions in its analysis (577 F.2d at 400), it is clear that those references are in the overall context of an inquiry into the reasonableness of the Commission's decision. See, *e.g.*, 577 F.2d at 396-397 (defining issue before the court as "Is the Commission's determination [in *Indiana Harbor I*] * * * rational and within the Interstate Commerce Commission's statutory powers?"); *id.* at 404 ("Therefore, in light of the standard of review enunciated in *Universal Camera Corp.* [v. *NLRB*, 340 U.S. 474, 488 (1951)], this Court now affirms the ruling of the Interstate Commerce Commission in all respects."). The Seventh Circuit's subsequent two decisions, moreover, are merely applications of *Indiana Harbor I*.[5] As the court of appeals concluded,

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[5] Indeed, the two subsequent decisions affirm Commission decisions permitting charges for transportation of empty cars to and from repair facilities because, in the Commission's view, particular characteristics of the charges took them outside the scope of the

then, its affirmance of *Indiana Harbor II* as a reasoned exercise of agency discretion poses no conflict with the Seventh Circuit's similar affirmance of *Indiana Harbor I* (and subsequent cases) as a reasoned exercise of agency discretion.

3. Petitioners further contend (Pet. 18-20) that the Commission's decision is arbitrary and capricious. According to petitioners, the Commission's decision "addresses purported concerns about cross-subsidization and misallocation of empty repair move costs among *railroads* by shifting those costs away from the railroads altogether and onto private car *providers*" (Pet. 19). Petitioners maintain that, under the common carrier doctrine reflected in 49 U.S.C. 11121(a)(1), railroads must bear the cost of maintaining and owning the cars. And petitioners object that, under the Commission's decision, private car owners will not be able to recover their full costs.

The court of appeals correctly rejected these objections. As the court pointed out, petitioners' contention that no empty car repair move costs should be borne by noncarriers would require the Commission to treat empty car repair move costs differently from other ownership costs. Pet. App. 18a. Moreover, private car providers are not entitled to a guarantee of full recovery of ownership costs. See *LO Shippers Action Comm.* v. *Aberdeen & Rockfish R.R.*, 4 I.C.C.2d 1, aff'd *sub nom. LO Shippers Action Comm.* v. *ICC*, 857 F.2d 802 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 2429 (1989). As the court of appeals

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Indiana Harbor I prohibition of such charges. See Pet. App. 41a (Commission explanation that several cases after *Indiana Harbor I* permitted charges for empty car repair moves). Like the Seventh Circuit's decision affirming *Indiana Harbor I*, moreover, the two subsequent decisions rest on a conclusion that the Commission's action was a permissible administrative decision. See *Evans*, 729 F.2d at 1111; *Atchison, T.&S.F. Ry.*, 611 F.2d at 1189-1190.

explained, "[p]rivate car providers have no statutory right to insulate themselves from market forces generally in fixing allowances to be paid by carriers for the use of railcars" (Pet. App. 18a); as a result, "providers have no right to sequester the empty-repair-move component of ownership costs from market forces." *Ibid.* The Commission's decision that empty repair moves should be treated like other ownership costs thus was entirely reasonable.

4. Finally, petitioners contend (Pet. 21-25) that, even if the change in policy was permissible, the Commission should not have applied it to the parties in the proceeding in which it was announced. Petitioners apparently do not dispute that an agency is "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance in the [agency's] discretion." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). See also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency"). Rather, petitioners' contention is that the proceeding was converted into a rulemaking when the agency solicited outside comments on its proposed change in policy, and that, as *Bowen* v. *Georgetown University Hospital*, 109 S. Ct. 468 (1988) makes clear, a rulemaking ordinarily may not be applied retroactively.

As the court of appeals pointed out, however, an adjudication is not transformed into a rulemaking simply because an agency solicits general comments. Pet. App. 25a. Just as an agency "has discretion to decide that the adjudicative procedures in [a] case may * * * produce the relevant information necessary to mature and fair consideration of the issues" (*Bell Aerospace*, 416 U.S. at 295), so too an agency may decide that allowing affected parties

to comment may aid that "mature and fair consideration of the issues," and its decision to do so does not convert an adjudication into a rulemaking. Petitioners' claim that the adjudication became a rulemaking through the solicitation and receipt of comments is thus unavailing.

Petitioners also maintain that the court of appeals' decision conflicts with Justice Scalia's concurrence in *Georgetown University Hospital.* Pet. 23-24. Once petitioners' erroneous premise that the solicitation of comments converted the adjudication into a rulemaking is rejected, however, it is clear that the court of appeals' decision—and the Commission decision which it affirms—actually reflect the distinction between rulemaking and adjudication emphasized in the concurrence. The concurrence noted that, under the Administrative Procedure Act, "rules have legal consequences only for the future" and that adjudications have "future as well as past legal consequences." 109 S. Ct. at 476. Consistent with this distinction, the Commission applied the principle it announced to the parties in this adjudication. See *Georgetown University Hospital*, 109 S. Ct. at 478 (concurring opinion) (in an adjudication, "retroactivity is not only permissible but standard"). As the court of appeals concluded, moreover, application of the newly announced principle in this proceeding was fair and equitable. Pet. App. 26a-27a.[6]

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[6] Petitioners suggest (Pet. 24) that the court of appeals' opinion accompanying the denial of the petition for rehearing recognized a conflict between its opinion and the *Georgetown University Hospital* concurrence. Like the concurrence (109 S. Ct. at 478, 480), however, the court of appeals recognized that adjudications must ordinarily be applied retroactively and that new principles may be announced in adjudications and applied retroactively. Pet. App. 26a. As petitioners note (Pet. 21), the rehearing opinion states that "[w]hile arguments no doubt can be advanced in support of limiting agencies' policymaking use of the adjudicatory form to circumstances where 'legal consequences hinge upon the interpretation of statutory requirements, and where no pre-existing interpretive rule construing those requirements is in effect,' *Georgetown Univ. Hosp.*, 109 S. Ct. at 480 (Scalia, J.,

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1990

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concurring) * * * the law of this circuit is emphatically to the contrary." Pet. App. 34a. This statement in the rehearing opinion does not, however, suggest any conflict on the general applicable principles. In any event, the Commission's change here did not involve a change in a "pre-existing interpretive rule"; the *Indiana Harbor I* policy itself was developed through adjudication. Petitioners' related suggestion that the court of appeals' decision conflicts with decisions of the Ninth Circuit and the Fifth Circuit (Pet. 24-25) regarding the use of adjudications to change policy is also insubstantial. The Ninth Circuit clearly recognizes that "[a]dministrative agencies are free to announce new principles during adjudication" (*Cities of Anaheim* v. *FERC*, 723 F.2d 656, 659 (1984)), provided the adjudication does not impose undue hardship and neither amends a recently adopted rule nor supplants a pending rule-making proceeding; neither condition is present here. Similary, the Fifth Circuit decision relied on by petitioners simply applied the settled *Chenery* principle that the choice between rulemaking and adjudication is primarily the agency's, and upheld the agency's decision to proceed by rulemaking. *Nueces County Navigation District No. 1* v. *ICC*, 674 F.2d 1055, 1065-1066, cert. denied, 459 U.S. 1035 (1982).

* The Solicitor General is disqualified in this case.

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